DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-25
Title: Edward F. Maracich, et al., Petitioners
v.
Michael Eugene Spears, et al.
Docketed: July 6, 2012
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (10-2021)
Decision Date: April 4, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jul 2 2012	Petition for a writ of certiorari filed. (Response due August 6, 2012)
Aug 6 2012	Brief of respondent Michael Eugene Spears, et al. in opposition filed.
Aug 20 2012	Reply of petitioner Edward F. Maracich, et al. filed.
Aug 22 2012	DISTRIBUTED for Conference of September 24, 2012.
Sep 25 2012	Petition GRANTED.
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Nov 9 2012	Joint appendix filed. (Statement of costs filed.)
Nov 9 2012	Brief of petitioners Edward F. Maracich, et al. filed.
Nov 13 2012	Record received from U.S.C.A. for 4th Circuit. (1 box)
Nov 16 2012	CIRCULATED.
Nov 16 2012	Brief amici curiae of Electronic Privacy Information Center, et al. filed. (Distributed)
Nov 16 2012	Brief amicus curiae of Electronic Frontier Foundation filed. (Distributed)
Nov 28 2012	Record from U.S.D.C. for the District of South Carolina is electronic.
Dec 10 2012	Brief of respondents Michael Eugene Spears, et al. filed. (Distributed)
Jan 2 2013	Reply of petitioners Edward F. Maracich, et al. filed. (Distributed)
Jan 9 2013	Argued. For petitioners: Joseph R. Guerra, Washington, D. C. For respondents: Paul D. Clement, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

No. 12-25

FILED
JUL 2 - 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

EDWARD F. MARACICH, MARTHA L. WEEKS,
AND JOHN C. TANNER,

Petitioners,

v.

MICHAEL EUGENE SPEARS, MICHAEL SPEARS, P.A.,
GEDNEY M. HOWE, III, GEDNEY M. HOWE, III, P.A.,
RICHARD A. HARPOOTLIAN,
RICHARD A. HARPOOTIAN, P.A.,
A. CAMDEN LEWIS, AND LEWIS & BABOCK, LLP,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Driver's Privacy Protection Act of 1994 ("DPPA" or "Act"), 18 U.S.C. §§ 2721-2725, prohibits the obtainment, use, or disclosure of "personal information" maintained in state motor vehicle department ("DMV") databases, unless the use of such information falls within one of several discrete enumerated exceptions. This case presents an opportunity for this Court to resolve a conflict among the circuits and even state courts as to the circumstances under which the litigation exception to the Act permits lawyers special rights of access to DPPA-protected information.

In this case, the Fourth Circuit became the first court to hold that the acquisition and use by lawyers of confidential information from a DPPA-protected database solely for the purpose of soliciting clients, as opposed to searching for evidence or witnesses, qualified as a use "in connection with" litigation, pursuant to 18 U.S.C. § 2721(b)(4). The Eleventh Circuit, the Third Circuit, and the District of Columbia Court of Appeals, on the other hand, have held that the litigation exception does not permit lawyers to obtain or use DPPA-protected information to find or solicit clients. Instead, these courts have made clear that the litigation exception permits use of private information only when the information is relevant or likely to lead to discovery of evidence or witnesses. The Fourth Circuit has crossed that line, thereby inserting into the DPPA what amounts to a "for use

QUESTION PRESENTED – Continued

by lawyers" exception, as opposed to a "for use in litigation" exception, and further muddling an already confusing and conflicted area of the law.

This petition asks the Court to consider two questions:

1. Whether the Fourth Circuit erred in holding, contrary to every other court heretofore to have considered the issue, that lawyers who obtain, disclose, or use personal information solely to find *clients* to represent in an incipient lawsuit – as opposed to *evidence* for use in existing or potential litigation – may seek solace under the litigation exception of the Act.

2. Whether the Fourth Circuit erred in reaching the conclusion (in conflict with prior precedent) that a lawyer who files an action that effectively amounts to a "place holder" lawsuit may thereafter use DPPA-protected personal information to solicit plaintiffs for that action through a direct mail advertising campaign on the grounds that such use is "inextricably intertwined" with "use in litigation."

LIST OF PARTIES

The following were parties to the proceedings in the United States Court of Appeals for the Fourth Circuit:

1. Edward F. Maracich, individually and on behalf of all others similarly situated, Martha L. Weeks, individually and on behalf of all others similarly situated, and John C. Tanner, individually and on behalf of all others similarly situated, were plaintiffs-appellants below and are petitioners on review.

2. Michael Eugene Spears; Michael Spears, PA; Gedney Main Howe, III; Gedney Main Howe III, PA; Richard A. Harpootlian; Richard A. Harpootlian, PA; A. Camden Lewis; and Lewis & Babcock, LLP, were defendants-appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Edward F. Maracich, Martha L. Weeks, and John C. Tanner, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is reported at 675 F.3d 281 (4th Cir. 2012), and reprinted in the Appendix ("App.") at 1a-44a. The District Court's opinion and order granting Respondents' motion for summary judgment and denying Petitioner's motion for summary judgment is available at 7:09-cv-01651-HMH, and is reprinted at App. 47a-84a.

JURISDICTION

The Fourth Circuit Court of Appeals issued its decision on April 4, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Driver's Privacy Protection Act of 1994 ("DPPA"), 18 U.S.C. §§ 2721-2725, "regulates the disclosure of personal information contained in the records of state motor vehicle departments (DMVs)."

Reno v. Condon, 528 U.S. 141, 143 (2000). The statute is reproduced in full at App. 102a-110a.

STATEMENT OF THE CASE

Statutory Framework

The DPPA "establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information[1] without the driver's consent," "generally prohibit[ing] any state DMV, or officer, employee, or contractor thereof from 'knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.'" *Reno*, 528 U.S. at 144 (quoting 18 U.S.C. § 2721(a)) (second and third alterations in original). It "also regulates the resale and redisclosure of drivers' personal information by private persons who have obtained that information from a state DMV." *Id.* at 146.

There is a private right of action under the DPPA for the benefit of individuals whose private "personal information" is obtained, used, or disclosed "for a purpose not permitted" under § 2721(b). 18 U.S.C.

[1] "Personal information" is defined as "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information." 18 U.S.C. § 2725(3).

§ 2724(a). Statutory liquidated damages are available to a prevailing plaintiff. 18 U.S.C. § 2724(b). Intentional or knowing violations of the Act may also give rise to criminal sanctions. 18 U.S.C. §§ 2722, 2723.

Section 2721(b) provides that personal information may only be disclosed for an expressly enumerated list of purposes. The permissible purposes most relevant to this petition are as follows:

> (4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.
>
> . . .
>
> (12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

18 U.S.C. § 2721(b). These exceptions to the general proscription on the obtainment, disclosure, or use of personal information are often referred to as the "litigation exception" and the "bulk solicitation exception."

Factual Background

The defendants in this case are South Carolina attorneys ("the Lawyers") who brought so-called "group action" lawsuits in South Carolina state court against various car dealerships in 2006 and 2007, in which they contended the dealerships charged fees which were not properly disclosed as required by the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (S.C. Code Ann. § 56-15-10 *et seq.*).

Prior to filing suit, the Lawyers instituted two requests to the South Carolina DMV[2] for the personal information of individuals who had purchased automobiles in a given county during specified dates. The Lawyers subsequently made three more requests to the state DMV for personal information of vehicle purchasers. The DPPA-protected personal information of thousands of vehicle purchasers was obtained.

The letters represented that the personal information of car owners was sought "in anticipation of litigation" and authorized under the DPPA's litigation exception, but did not disclose that the Lawyers did not seek this information for use as evidence or to identify witnesses. More specifically, the Lawyers did not disclose that they intended to use this information to solicit car buyers to hire the Lawyers for

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[2] The requests were made pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 *et seq.*

lawsuits against car dealers, many for which the Lawyers did not as yet have even a single client with standing to sue. Shortly after the second request, the Lawyers sued 51 dealerships on behalf of four named plaintiffs. At least 47 of these dealerships had not transacted business with any of the Lawyers' clients. The Lawyers later amended the Complaint to increase the number of plaintiffs to 8 and the number of dealerships to 324. At least 316 of the dealerships sued had not transacted business with any of the Lawyers' clients.

Between January 2007 and May 2007, the Lawyers posted six bulk mailings of thousands of form letters soliciting business ("the Letters") to individuals whose names and addresses were obtained from DPPA-protected DMV databases. The Letters, which carried a legend on their face disclosing they were "**ADVERTISING MATERIAL**," stated that the Lawyers represented consumers who had been charged allegedly unlawful add-on fees by car dealerships, and offered to discuss the recipient's "rights and options . . . in a free consultation." App. 10a. The Lawyers filed a copy of the Letters, as well as a list of the recipients' names and addresses (which is considered "personal information" under the Act) with the South Carolina Office of Disciplinary Counsel, as required by South Carolina's rule regulating direct mail solicitation by lawyers. The Office of Disciplinary Counsel was not informed that the personal information of the car buyers was confidential, and it was filed of public record in violation of the Act.

Around May 2007, after receiving one of the Letters, John Tanner, one of the class representatives named in this action, called one of the Lawyers, Richard Harpootlian, to ascertain how his contact information had been procured. Tanner received an "aggressive sales pitch" to hire the Lawyers. App. 13a. Harpootlian assured Tanner that he stood to gain a hefty recovery if he hired the Lawyers to sue the dealer who had sold him his car. Tanner was not asked anything about the circumstances surrounding his automobile purchase.

On June 23, 2009, Petitioners filed the instant action against the Lawyers in the United States District Court for the District of South Carolina, alleging that the Lawyers' obtainment, disclosure, and use of their personal information without their consent for the statutorily prohibited use of solicitation violated the DPPA. The court had jurisdiction under 18 U.S.C. § 2724(a). On August 3, 2009, the Lawyers moved to dismiss the complaint on multiple grounds. However, the only purported basis for dismissal relevant to this petition was the Lawyers' contention that their conduct was permitted by the litigation exception to the DPPA's bar on obtainment, disclosure, or use of personal information.

The District Court denied the Lawyers' motion to dismiss on the grounds that further factual development was necessary to determine whether the Lawyers' actions were permissible under the DPPA. (The District Court's opinion and order denying the

Lawyers' motion to dismiss is reprinted at App. 86a-101a.) Nearly one year later, however, the District Court reversed itself. Despite a stay order in the interim which prevented plaintiffs from taking any discovery, the District Court granted the Lawyers' motion for summary judgment, which was premised, according to the Fourth Circuit, on "essentially the same arguments [the Lawyers] had asserted in their unsuccessful Motion to Dismiss." App. 20a.

The District Court Opinion

The District Court made three holdings relevant to this petition.

First, the court held that, "[i]n light of the unique representative function under group action," App. 21a, the Lawyers' mailing of the Letters offering to represent the recipients in litigation against the dealers did not constitute solicitation as a matter of law. App. 61a. Analogizing to the law of class actions, in which "the [class] attorney[ ] assume[s] fiduciary obligations or constructive attorney-client status with respect to the class," App. 59a-60a (quoting 3 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 15.16 (4th ed. 2002) (alterations in original)), the court observed that "[s]olicitation of parties [to help maintain the action on behalf of a class] may be entirely appropriate, if not required, as part of class counsel's fiduciary duty." App. 61a (quoting *In re Avon Sec. Litig.*, 1998 WL 834366, at *10 (S.D.N.Y. Nov. 30, 1998) (alteration in original)). The District Court

reasoned that "even if an attorney-client relationship does not exist between the [Lawyers] and the unnamed Car Buyers, at a minimum, since the inception of the [group action], the [Lawyers] have owed all unnamed Car Buyers a fiduciary duty." App. 61a. Remarkably, the court concluded that the Lawyers' conduct was not "solicitation" within the meaning of the DPPA.

Second, the District Court held that, even assuming *arguendo* that the Lawyers had used individuals' personal information for the impermissible purpose of solicitation, they would not have violated the DPPA if they "had a permissible purpose for obtaining, using, and disclosing the personal information." App. 62a. Purporting to follow the lead of the Eleventh Circuit, the court reasoned that "the statutory exceptions found in section 2721(b) are not mutually exclusive," and thus when "two statutory provisions that potentially apply" are involved, "both must be given effect unless they pose an either-or proposition." App. 63a (quoting *Rine v. Imagitas, Inc.*, 590 F.3d 1215, 1226 (11th Cir. 2009)). The court expressly split with and "decline[d] to follow the Third Circuit's holding in *Pichler v. UNITE*" that the DPPA "contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permissible purpose." App. 63a (quoting *Pichler v. UNITE*, 542 F.3d 380, 395 (3d Cir. 2008)).

Finally, the court held that the Lawyers' obtainment and use of the personal information was lawful under the litigation exception to the DPPA (18 U.S.C.

§ 2721(b)(4)), reasoning that it was "in connection with" the group action suits against the car dealers. Specifically, the District Court accepted the Lawyers' arguments that the information requests and Letters were necessary to "identify[ ] the highest volume dealers" and to "identify a Car Buyer for every Car Dealer in order to respond to the [plaintiffs'] motions to dismiss [for lack of standing]." App. 71a, 75a.

The Fourth Circuit Opinion

Petitioners timely appealed the District Court's grant of summary judgment in favor of the Lawyers. The Court of Appeals for the Fourth Circuit affirmed, but on different grounds from the District Court. The Fourth Circuit held, contrary to the District Court, that the Letters did in fact amount to solicitation under the DPPA, since the Lawyers' conduct was "consistent with the common understanding of the meaning of the word as targeted lawyer advertising aimed at affording representation to potential clients." App. 28a. However, the court concluded that this use of the recipients' personal information was nonetheless permissible under the statute because it "was integral to, and was, indeed, inextricably intertwined with the Lawyers' permissible use of the Buyers' personal information pursuant to the litigation exception." App. 29a.

In reaching its holding, the court acknowledged that there is "manifest tension between the solicitation and litigation exceptions under the DPPA" and

that "the limited number of cases among our sister circuits reflect that the law in this area is in a state of continued evolution." App. 30a. However, the Fourth Circuit concluded, as had the District Court, that "the Eleventh Circuit's approach provides the better reasoned interpretation of the Act" than that of the Third Circuit. App. 37a. The court then went a step further than the Eleventh Circuit, expanding the "inextricably intertwined" reasoning to encompass, for the first time, a situation in which the information was used to locate clients to bring lawsuits. The Lawyers, explained the court, "always had only one use as their purpose, i.e. litigation, litigation that at all times of their conduct was either imminent or ongoing." App. 37a. Indeed, the court went so far as to say that the Lawyers "simply could not make appropriate, efficient and ethical use of the Buyers' personal information ... without first engaging in solicitation." App. 38a.

According to the court, because "the Lawyers already had been contacted by potential clients" regarding cases against other defendants prior to instituting the requests for information and sending the Letters, "it cannot be said that they were merely 'trolling.'" App. 42a. Instead, the Lawyers' conduct was permissible under the litigation exception, since "[t]he solicitation of clients by trial lawyers is surely connected to litigation in that representation for a legal claim is the goal." App. 42a.

This petition follows.

REASONS FOR GRANTING THE WRIT

This is a case about privacy. It is also a case about whether lawyers can claim special status in pursuit of the business of the practice of law. It raises the question of whether lawyers – in contrast to every other type of professional or business – are granted special dispensation under the DPPA to invade the privacy of thousands of individuals for the sole purpose of solicitation of new business. Rejecting the ruling and reasoning of every other court that has considered this issue, the Fourth Circuit concluded that if soliciting lawyers find clients to hire them to file lawsuits, the solicitation itself is "inextricably intertwined" with litigation and the use of statutorily-protected information for solicitation is therefore permissible. By this logic, the Fourth Circuit has converted the "for use in litigation" exception into a "for use by lawyers" exception to the DPPA, and has staked out new ground, creating a conflict in the law that this Petition asks the Court now to resolve.

This case presents a compelling opportunity for this Court to resolve the split that now exists among the circuit courts and even some state courts concerning the statutory right of individuals to have kept private the personal information they must disclose to state DMVs. The question presented in this case is squarely presented before the Court; it was raised and argued at both levels below and is clouded by no jurisdictional or standing issues. Accordingly, this case provides a clean vehicle by which the Court may resolve an exceedingly important federal question.

In reaching the unprecedented conclusion that pure solicitation of clients may qualify as "investigation in anticipation of litigation" within the meaning of the Act, the Fourth Circuit was not troubled by the prospect of a lawyer filing a lawsuit that effectively amounts to nothing more than a "place holder" (because the lawyer has as yet no clients to pursue the claims that have been filed) and then obtaining potential litigants' personal information from state DMVs to solicit them to pursue the lawsuit. Its ruling is directly in conflict with precedent from the Third Circuit, the Eleventh Circuit, and the District of Columbia Court of Appeals, and the resulting confusion regarding the proper interpretation of a federal statute implicating personal privacy warrants this Court's expeditious intervention. (The fact that the Fourth Circuit purported to, but did not, follow the lead of the Eleventh Circuit is a testament to the magnitude of this confusion.) Moreover, it is important the split in the circuits be resolved now, and not put off for some other day, so that lawyers seeking DPPA-protected personal information, and the state DMVs who maintain it, are not put at future risk of the serious sanctions provided for by the Act because of conflicting opinions by various courts.

The court below not only muddled an already complex area of federal law, it also reached a decision that, if allowed to stand, has profoundly troubling policy implications. The Fourth Circuit's interpretation of the Act would permit any lawyer, at any time, to obtain and use the personal information of individuals from state DMVs to solicit clients without

their prior consent – thereby, as has been stated, creating, out of whole cloth, a "for use by lawyers" exception to the DPPA. This is a perverse and troubling result that Congress could not have intended. Pure solicitation of business – that is, the mere trolling for parties to bring a potential or incipient lawsuit, as opposed to the gathering of evidence for use in litigation – with the aid of statutorily-protected personal information is something no other court has permitted as a use of DPPA-protected personal information. It has not mattered to any other court whether the advertiser soliciting business is a lawyer or any other person or enterprise looking to peddle its wares or promote its services. This case squarely presents the Court with the opportunity to resolve the uncertainty that the Fourth Circuit has created and to make clear that attorneys, as advertisers looking for customers, have no special right to invade individuals' personal privacy under the guise of the litigation exception to the DPPA.

I. THIS CASE PRESENTS A CLEAR-CUT OPPORTUNITY FOR THIS COURT TO RESOLVE THE CONFLICT AMONG THE LOWER COURTS AND MAKE IT PLAIN THAT ATTORNEYS MAY NOT OBTAIN STATUTORILY-PROTECTED PERSONAL INFORMATION FOR THE SOLE PURPOSE OF SOLICITING CLIENTS WITHOUT THEIR CONSENT.

The Fourth Circuit's holding can be divided into two parts. First, the court declined to follow the Third

Circuit, as well as the District of Columbia Court of Appeals, in concluding – contrary to every other court heretofore to have considered the issue – that pure solicitation of clients qualifies as a permissible use under the litigation exception of the Act. Second, the court purportedly followed the lead of the Eleventh Circuit, while rejecting precedent from the Third Circuit, in holding that a permissible use of personal information under the DPPA exempts a defendant from liability for an impermissible use, so long as the latter use is "inextricably intertwined with" the former.

Thus, the Fourth Circuit's first holding *created* a split among the lower courts regarding the appropriate construction of the DPPA where there was none before, and its second holding *contributed* to a split regarding the proper test to apply to claims under the DPPA. The result is an ever-widening divergence among the lower courts regarding the proper interpretation of an important federal statute concerning personal privacy.

The Fourth Circuit's holding that pure solicitation by lawyers falls within the litigation exception to the DPPA is wrong as a matter of law and policy. It is the product of a tortured interpretation of the DPPA and, if allowed to stand, will leave a gaping loophole in the statutory scheme. In this case, the Lawyers ultimately made available in the public records the personal information of thousands of car buyers. The Fourth Circuit's reasoning would give lawyers free reign to invade any individual's personal privacy in

order to solicit business, thereby creating a "lawyer exception" to the Act that is found nowhere in the statutory language, and threatens to contribute to concerns the public already has about the "professionalism" of the legal profession.

A. Pure solicitation does not qualify as a permissible use of personal information under the litigation exception.

In construing a statute, courts "look first to its language, giving the words used their ordinary meaning." *Roberts v. Sea-Land Servs., Inc.*, 132 S.Ct. 1350, 1356 (2012). "Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). In this case, an examination of the plain terms of the litigation exception, the interpretation of the statute by other courts, and Congressional intent as well as the exception's context in the larger statutory scheme, makes pellucidly clear that the litigation exception does not encompass conduct such as that of the Lawyers.

1. Every other court to consider the issue has recognized that solicitation of clients by lawyers is not proper under the litigation exception.

As the court below recognized, the "common understanding of the meaning of the word" solicitation

is "targeted lawyer advertising aimed at affording representation to potential clients." App. 28a. The litigation exception to the DPPA, on the other hand, provides that personal information may be disclosed

> for use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

18 U.S.C. § 2721(b)(4).

The concept of solicitation, according to its ordinary meaning, does not fit within the plain language of the litigation exception. That exception does not allow lawyers to use personal information to obtain *plaintiffs* for a lawsuit. One does not solicit plaintiffs "in connection with" ongoing litigation or in "investigation in anticipation of litigation." One solicits plaintiffs in order to *start* litigation.

In *Pichler v. UNITE*, 585 F.3d 741 (3d Cir. 2009) ("*Pichler VII*"),[3] the Third Circuit rebuffed a non-profit

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[3] The *Pichler* case has a somewhat tortuous procedural history. For purposes of this petition, the three relevant decisions are *Pichler v. UNITE*, 446 F. Supp. 2d 353 (E.D. Pa. 2006) ("*Pichler III*") (ruling on cross motions for summary judgment); *Pichler v. UNITE*, 542 F.3d 380 (3d Cir. 2008) ("*Pichler V*") (affirming the district court's holding that the defendant had

(Continued on following page)

organization's attempt to obtain access to DPPA-protected information, which the organization planned to use to locate individuals to pursue claims against a labor union. The Third Circuit stated flatly that "the litigation exception of the DPPA requires something more than merely using the protected records to identify potential litigants." 585 F.3d at 751. The court determined that, since the information sought under the DPPA "would do nothing more than identify potential litigants and claimants who may wish to pursue remedies," the organization was not permitted to obtain or use it, stating that this "is not enough to compromise the privacy afforded motorists by the DPPA." *Id.* at 752. The court expressed concern that a contrary holding would present a "great[ ]" "risk of a fishing expedition or some other form of mischief." *Id.* at 752 (quoting Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts,* 105 Harv. L. Rev. 427, 499 (1991)).

The court of last resort in the District of Columbia, the D.C. Court of Appeals, has offered a similarly clear rejection of the Fourth Circuit's position: "[A]cquiring personal information from the motor vehicle records for the purpose of finding and soliciting clients for a lawsuit is not a 'permissible use' within the meaning of § 2721(b)." *Wemhoff v. D.C.*, 887 A.2d 1004, 1012 (D.C. 2005). As one of the courts

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violated the DPPA); and *Pichler v. UNITE*, 585 F.3d 741 (3d Cir. 2009) ("*Pichler VII*") (considering appeal from the district court's refusal to modify a protective order).

in the Eleventh Circuit observed, the "litigation exception has its limits," one of which is that it does not include identifying potential litigants. *Young v. W. Publ'g Corp.*, 724 F. Supp. 2d 1268, 1279 n.4 (S.D. Fla. 2010).

Even the Eleventh Circuit Court of Appeals, which the Fourth Circuit purported to follow, has applied the litigation exception only to cases in which the defendant was actually seeking *evidence* for use in litigation, but never to a case in which the defendant was merely looking for parties to a lawsuit. *See Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107 (11th Cir. 2008). The Eleventh Circuit concluded that the litigation exception applies if the defendant is using motor vehicle records "for the purpose of identifying *potential witnesses* to testify in lawsuits" that are either ongoing or imminent. *Id.* at 1110, 1115 & n.5. On the other hand, "if a plaintiff is a recipient of a mass marketing letter, it is no secret that (b)(12) is at issue, which allows for bulk distribution of solicitations only if express consent is obtained." *Id.* at 1114.

The Third Circuit reached a similar conclusion about the use contemplated by (b)(4), stating that the litigation exception was applicable to a request for disclosure only if the information sought would "advance the inquiry of a[ ] decisionmaker charged with deciding" a claim. *Pichler VII*, 585 F.3d at 752. A court in the Southern District of New York has suggested a comparable test, finding that the defendants' use of the plaintiff's personal information was

permissible because the defendants used the information "in an effort to establish a particular point" relevant to a legal proceeding. *Manso v. Santamarina & Assocs.*, 2005 WL 975854, at *5 (S.D. N.Y. Apr. 26, 2005).

The Fourth Circuit's conclusion that the Lawyers' solicitation, conducted only to find parties to a lawsuit (rather than evidence or witnesses for use in a pending or potential lawsuit), was permissible under the litigation exception, is completely novel and unprecedented. The resulting circuit split is bound to engender further confusion about the proper interpretation of the DPPA.

2. Petitioners' reading of the DPPA is confirmed by the Congressional intent behind the enactment of the statute and the statutory scheme itself.

Congress wished to protect motorists' privacy, partly by ensuring that they were free from unwanted solicitation, when it passed and then later amended the Act. In *Reno v. Condon*, 528 U.S. 141, 144-45 (2000), this Court examined the history of the DPPA, and noted that, under the DPPA, "States may not imply consent from a driver's failure to take advantage of a state-afforded opportunity to block disclosure, but must rather obtain a driver's affirmative consent to disclose the driver's personal information for use in surveys, marketing, solicitations,

and other restricted purposes." *See also Wemhoff*, 887 A.2d at 1012 (discussing the legislative history of the Act and concluding "[t]hat Congress deemed the requirement of consent in subsections (11), (12) and (13) to be vitally important is clear from the legislative history"). Attorneys are no more permitted than anyone else to flout Congress's proscription of unwanted solicitation.

The Act is not silent on the subject of using personal information to engage in commercial solicitation; indeed, there is a statutory exception for it, but it applies *only* "if the State has obtained the express consent of the person to whom such personal information pertains." 18 U.S.C. §2721(b)(12). This consent provision "suggest[s] that Congress did not intend that personal information in motor vehicle records would be used to contact persons to become plaintiffs in a lawsuit, nor that such information would be disclosed, without the consent of the affected person." *Wemhoff*, 887 A.2d at 1012.

The Fourth Circuit's failure to realize this elementary point – that solicitation, by lawyers, telemarketers, or traveling salesmen, is not permissible under the DPPA – caused it to grossly misapply even its own test. Even assuming *arguendo* that the "inextricably intertwined" test was a proper interpretation of the DPPA, the Lawyers' actions in this case were not permissible because their use of the information was not "inextricably intertwined" with the Dealers Act litigation at all.

Had the Lawyers been calling individuals in order to find witnesses, or documentary evidence, or some other information that would "establish a point" in the litigation against the car dealers, perhaps their conduct would have passed muster under the Fourth Circuit's test. But they were not. The record does not indicate that the Lawyers did anything *other* than solicit clients with the information. Indeed, the opinion below does not clearly state which of the Lawyers' uses of the personal information were permissible under the DPPA, and which were impermissible yet immunized because they were "inextricably intertwined" with permissible uses. One might plausibly argue, then, that the Fourth Circuit's "inextricably intertwined" test was mere surplusage and that its actual holding – that is, the reasoning essential to its result – reduces to the following: When lawyers solicit clients without their consent, their conduct is not proscribed by the DPPA because legal solicitation *is* sufficiently "connected" to litigation to fall within the section 2721(b)(4) exception.[4] Such a holding essentially creates a "lawyer exception" to the DPPA that is found nowhere in its text.

The Letters were a sales pitch, pure and simple. And the DPPA does not allow using statutorily-protected personal information in such a way, even if the salesman is an attorney.

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[4] Even so reduced, however, this holding creates a circuit split where there was none before, as discussed below.

B. The plain terms of the DPPA do not allow a defendant to escape liability for an impermissible use of personal information merely by later using it for a permissible use.

Section 2724 of the Act provides that "[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains. . . ." 18 U.S.C. §2724(a). Section 2721(b) enumerates fourteen permissible purposes for disclosure of personal information. As the Third Circuit has recognized, "the language of the statute is clear: The Act contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permissible purpose." *Pichler V*, 542 F.3d at 395.

The Eleventh Circuit has observed that, because the DPPA is written using the disjunctive "or," it establishes "alternative means of committing a violation." *Rine v. Imagitas, Inc.*, 590 F.3d 1215, 1224 (11th Cir. 2009). Following this logic, each unlawful "obtain[ment], disclos[ure], or use[ ]" by a defendant entitles the plaintiff to additional damages. *Pichler V*, 542 F.3d at 394. If a defendant uses personal information several times, and some uses are permissible and some are not, the defendant is liable for each of the impermissible uses – and the presence or absence of a permissible use is patently irrelevant. *See id.* at 395 (defendant labor union was liable for using

personal information in order to engage in union organization, notwithstanding any "other permissible purpose [it] may have had").

Other courts have embraced this common-sense reading of the statutory text. In *Manso*, the Southern District of New York noted that, even if a party properly obtains personal information pursuant to the litigation exception to the DPPA, use of the information "in a manner not reasonably related to that litigation might indeed give rise to the inference that the information was not actually obtained and used 'in connection with' that litigation." 2005 WL 975854, at *4. Similarly, in *Menghi v. Hart*, the defendant police officer had obtained personal information about the plaintiff by running her license plates during a traffic stop – an obviously permissible use. 745 F. Supp. 2d 89, 103-04 (E.D. N.Y. 2010). However, the defendant later used that personal information to make harassing phone calls to her. *Id.* at 103. These uses had no permissible purpose and thus constituted violations of the DPPA. *Id.* at 104.

Even if the record in this case showed that the Lawyers had also used the DPPA-protected information in some other way that was permissible (which it does not), that cannot excuse their separate use of the information for solicitation. There is no "safe harbor" provision in the DPPA. The Act does not authorize otherwise impermissible uses just because the information might also be used at some point for

a proper purpose. Each violation of the DPPA is just that – a violation of the DPPA.[5] It does not matter whether the unlawful conduct is joined – or even "inextricably intertwined" – with other conduct that is lawful. To interpret the Act otherwise, as did the Fourth Circuit in this case, does violence to its plain terms, and would allow protected confidential information, laundered by a permissible use, to be sold or diverted to otherwise impermissible uses, thereby defeating the purpose of the Act.

C. It is vitally important that the Court resolve the conflict and reject the Fourth Circuit's approach.

Even if the court below had properly interpreted the DPPA, the need for resolution of the conflict and uncertainty among the lower courts concerning this important federal statute would warrant the Court

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[5] For example, in the instant case, the Lawyers did more than obtain the personal information of car buyers without their consent, and then use that information to solicit them as clients – again without their consent. The Lawyers also filed a copy of the information with the South Carolina Office of Disciplinary counsel – *without redacting the plaintiffs' identifying personal information* or seeking some other protection for the thousands of individuals whose private information they had obtained from the DMV. Once on file with this office, that information was freely available to the world. Even if the Lawyers' initial obtainment and use of the plaintiffs' personal information were somehow permitted under the DPPA, this subsequent (and entirely unnecessary) disclosure without redaction was certainly not.

granting certiorari in this case. However, the Fourth Circuit's construction of the Act is wrong as a matter of law and has profoundly troubling policy implications – put simply, the holding below cannot be contained within rational bounds. This Court must not let the Fourth Circuit's decision stand.

If the Lawyers are permitted to file a suit against numerous car dealers with an initial complement of plaintiffs with standing to sue a small subset of the car dealers, then solicit additional plaintiffs using statutorily-protected personal information, why could they not, in the future, solicit plaintiffs in the first instance using such information merely on the theory that, "Surely *someone* has a grievance against these car dealers?" The *Pichler III* court recognized this problem. It pointed out that "at any given time[,] large companies such as DuPont or Dow Chemical are sure to be involved in multiple legal proceedings concerning discrimination, wage claims, or pollution." 446 F. Supp. 2d at 369. The court recognized that, were it to accept the defendant labor union's argument that its union organizing was a permissible use of personal information because it was integrally related to incipient labor litigation,

> any union – or for that matter any law firm – could research DuPont or Dow Chemical, learn of past litigation and therefore claim that litigation was "likely." It could then access the personal information of thousands of employees, contact them at their homes, and surely find *some* legal cases to prosecute. We

> do not believe that Congress drafted the DPPA just so we could eviscerate it by importing such claim trolling into its permissible uses.

Id. at 370.

Furthermore, as described above, the Fourth Circuit's decision essentially creates a "lawyer exception" to the DPPA. It would allow attorneys – and no one else – to arm themselves with the personal information of nonconsenting individuals and engage in commercial solicitation. But if lawyers can do this, why not other direct mail marketers, such as banks or credit card companies? If Lawyers may obtain DPPA-protected personal information for commercial advertising purposes and then, as in this case, disclose it to the public, of what use is the Act?

As of now, groups of commercial actors other than lawyers are not allowed to engage in such conduct, *see, e.g.*, *Rios v. Direct Mail Express, Inc.*, 435 F. Supp. 2d 1199 (S.D. Fla. 2006) (holding that defendant marketer's use of plaintiff's personal information for solicitation was prohibited by the DPPA), but one might understandably wonder why lawyers should receive special treatment. Indeed, Justice O'Connor has argued that widespread solicitation by attorneys may be even *more* worrisome than solicitation by other commercial actors:

> [T]he quality of legal services is typically more difficult for most laypersons to evaluate, and the consequences of a mistaken

> evaluation of the "free sample" may be much more serious. For that reason, the practice of offering unsolicited legal advice as a means of enticing potential clients into a professional relationship is much more likely to be misleading than superficially similar practices in the sale of ordinary consumer goods.

Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 481 (1988) (O'Connor, J, dissenting).

The Fourth Circuit's holding essentially makes it impossible for a lawyer to *ever* violate the DPPA by using personal information to solicit business. This is a perverse result that must be avoided. In *Welch v. Theodorides-Bustle*, the District Court flatly rejected the public official defendants' argument that they could disclose personal information with impunity because this constituted "'use' of the information by a 'government agency . . . in carrying out its functions' . . . regardless of whether the actual disclosure was otherwise for a proper purpose." 677 F. Supp. 2d 1283, 1286 (N.D. Fla. 2010) (citation omitted). The court could not have been clearer: "That is not so. If *any* disclosure by a public official was automatically proper, there could never be a claim under the Act against a public official. The statutory language does not support such a conclusion. . . ." *Id.* The plain language of the Act does not support a special exception for lawyers any more than it supports one for public officials.

When it comes to the DPPA's proscription of bulk solicitation, lawyers are *not* special; we must abide by

the statute just like everyone else. A contrary statement provides ample ammunition to those who would charge that the legal world, writ large, is losing its sense of professionalism. *See Shapero*, 486 U.S. at 481 (O'Connor, J, dissenting) (noting that "[t]he advice contained in unsolicited 'free samples' is likely to be colored by the lawyer's own interest in drumming up business, a result that is sure to undermine the professional standards that States have a substantial interest in maintaining").

"Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful,. . . . [they] are subjected to heightened ethical demands on their conduct towards those they serve." *Id.* at 489-90. One such "ethical demand" is that we maintain the high professional standards of those who have come before us, and resist becoming the assembly of ambulance chasers that the public so often portrays us as. The Fourth Circuit's decision, in essence, *allows* lawyers to access confidential information that other advertisers are prohibited from using, so that the lawyers can chase ambulances – and it does so under the auspices of a federal court's suspiciously lawyer-friendly interpretation of a statute. That decision must not stand.

II. BOTH THE CIRCUIT COURTS AND STATE COURTS ARE DIVIDED ON THE QUESTION OF WHEN OTHERWISE UNLAWFUL USE OF DPPA-PROTECTED INFORMATION MAY BE PERMITTED.

To bolster its holding that lawyers may use statutorily-protected personal information to solicit clients, the Fourth Circuit articulated a new test for determining whether a use is permitted under the DPPA. The Fourth Circuit held that, if an impermissible use of protected information is "inextricably intertwined with" a later permissible use, the initial impermissible use is allowed. This introduction of yet another test regarding the DPPA adds confusion and contributes to a split among the lower courts. Additionally, as noted above, the Fourth Circuit's application of its own test grants immunity to any lawyer – or, at least, any litigator or "trial lawyer" – to make any use of private statutorily-protected information so long as he then files a lawsuit at some point in the future.

In addition to the "inextricably intertwined" test adopted by the court below, at least three other methods of analyzing the interplay among the DPPA's exceptions have been put forward in the lower courts. These three tests will be discussed in turn.

A. In the Third Circuit, liability arises under the DPPA for any impermissible use of personal information, even if such use is executed in conjunction with a permissible use.

In *Pichler v. UNITE*, *supra*, the Third Circuit considered whether UNITE, a labor union that had engaged in a practice called "tagging" as part of a union-organizing campaign against Cintas Corporation, had thereby violated the DPPA. The "tagging" consisted of UNITE organizers "us[ing] license plate numbers on cars found in Cintas parking lots to access information contained in state motor vehicle records relating to those license plates." *Pichler V*, 542 F.3d at 384. The union then used that information to make house calls on Cintas employees.

A "major component of the campaign to organize and unionize Cintas workers was finding potential legal claims against Cintas." *Id.* at 383. In doing so, UNITE sought to "develop [a] legal and moral attack on [the] company." *Pichler III*, 446 F. Supp. 2d at 358. The home visits were made both to effectuate this litigation strategy and to find Cintas employees interested in unionization. *Id.* at 356, 361-62.

The litigation component of the campaign was indubitably successful; in a period of two years, "UNITE brought or assisted in bringing against Cintas six federal cases, three state court cases, eighteen charges with the Equal Employment Opportunity Commission . . . and four charges with the

Occupational Safety and Health Administration." *Id.* at 363. It "also filed unfair labor practice charges with various offices of the National Labor Relations Board" and helped two individuals file complaints concerning wages. *Id.*

Eight employees of Cintas whom UNITE had contacted then sued the union, arguing that UNITE's actions violated the DPPA. The District Court ruled in favor of the plaintiffs, reasoning that under the terms of the DPPA, "one who obtains information is liable each time one gets information 'for a purpose not permitted.'" *Id.* at 367. The court concluded:

> Accordingly, if UNITE had three purposes for "obtain[ing], disclos[ing] or us[ing] [plaintiffs'] personal information" and two of those were "permissible uses" but the third was not, UNITE would still be liable for the third purpose. The Act contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permissible use.

Id.

The Third Circuit endorsed the District Court's reasoning and affirmed, holding that UNITE's actions violated the DPPA "[b]ecause UNITE obtained and used the confidential information for an impermissible purpose – union organizing." *Pichler V*, 542 F.3d at 395. According to the court, the existence of this impermissible purpose was sufficient to constitute a

violation "no[ ] matter what other permissible purpose UNITE might have had." *Id.*

The Third Circuit expressly rejected UNITE's "unique argument" that "its labor-organizing purpose may not be severed from" other permissible purposes that the union claimed to have for using the personal information. *Id.* Specifically, UNITE had asserted that its conduct satisfied the litigation exception to the DPPA because its "activity in investigating potential litigation was part and parcel of its unionizing campaign, not separate and distinct from it." *Id.* The court summarily dispatched this contention:

> The litigation component to UNITE's campaign should not obscure what UNITE was trying to accomplish – organizing labor. . . . [T]he organizers themselves, in conducting their home visits, unambiguously explained that they were "organizing a union campaign against Cintas." Regardless of UNITE's attempts to mask this clear labor-organizing purpose behind the veil of a litigation purpose . . . Congress has not permitted UNITE to do so.

Id. at 395-96 (citation omitted).

Notably, UNITE's argument that its use of the personal information in litigation was "part and parcel" of its use of the information in union organizing, which the Third Circuit found not only "unique" but also meritless, is essentially identical to the Fourth Circuit's holding in the instant case. The litigation component of UNITE's strategy was by no

means insubstantial; the union brought or assisted in bringing *thirty-one* separate actions against Cintas. *Pichler III*, 446 F. Supp. 2d at 363. Yet it still was not enough to immunize the defendant's impermissible uses of the plaintiffs' personal information.

The Third Circuit also refused to allow the use of DPPA-protected information by a non-profit organization (the National Right to Work Legal Defense Foundation ("NRTW")) who wanted to identify other individuals whose rights had been violated by UNITE. *Pichler VII*, 585 F.3d at 742, 745. The Third Circuit found that the NRTW's proposed use of the protected information to send letters advising potential litigants of their rights and offering free legal advice was not permitted by the DPPA. *Id.* at 745, 752-53. Like the Lawyers in this case, the NRTW attempted to claim that the use of the protected information to identify "similarly situated victims" of UNITE was connected to already existing litigation – the action that had been filed by the *Pichler* plaintiffs. *Id.* at 751. The Third Circuit rejected this attempt to create a connection to the *Pichler* action solely to immunize the improper use of DPPA-protected information to identify potential litigants and claimants. *Id.* at 752-53.

Thus, had the court below applied the *Pichler* test rather than the newly-fashioned "inextricably intertwined" test, Petitioners would have unquestionably prevailed. Under the Third Circuit's reasoning, the Lawyers' impermissible solicitation without consent would not be immunized under the DPPA

merely by being "inextricably intertwined with" (that is, "part and parcel" of) conduct permissible under the litigation exception.

B. In the Eleventh Circuit, a defendant who uses an individual's personal information for the purpose of solicitation may not be liable under the DPPA if the same use satisfies one of the other statutory exceptions.

The Eleventh Circuit's view of the proper reconciliation of the enumerated exceptions under the DPPA is discussed most extensively in *Rine v. Imagitas, Inc.*, 590 F.3d 1215 (11th Cir. 2009). The *Rine* litigation arose when a group of Florida drivers received vehicle registration notices in envelopes containing advertisements and commercial solicitations from Imagitas, a marketing company. The drivers sued Imagitas, alleging that the company had violated the DPPA by using the plaintiffs' personal information to send targeted advertisements and solicitations with the renewal notices. Imagitas had obtained the personal information by virtue of a contract it had with the state of Florida under which the company agreed to "develop, produce, and distribute registration renewal notices to Florida drivers in participating counties." 590 F.3d at 1219. The advertising revenues thereby generated "were intended to offset the costs of producing and mailing registration renewals, saving Florida counties from the expense." *Id.* at 1219-20.

The Eleventh Circuit rejected the plaintiffs' argument that Imagitas had violated the DPPA by using personal information to engage in nonconsensual bulk solicitation. The court determined that Imagitas's actions were lawful under the "state action" exception to the DPPA. *Id.* at 1225. According to the court, Imagitas did not have to comply with the consent requirement of the bulk solicitation exception (section 2721(b)(12)) because the "case involve[d] two statutory provisions that potentially apply," both of which "must be given effect unless they 'pose an either-or proposition.'" *Id.* at 1226 (quoting *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253 (1992)). Because the state action and bulk solicitation exceptions were not "mutually exclusive," either or both of them "may be applicable to a given situation," and only one need apply for the disclosure at issue to be permissible. *Id.*

While the Fourth Circuit purported to follow the Eleventh Circuit in the instant case, the Eleventh Circuit did not hold that a defendant making *multiple separate* uses (or permitted use, but improper disclosure) of personal information, some permissible and some impermissible, would escape liability. Rather, the *Rine* court considered Imagitas's actions to be entirely lawful because it viewed the advertising and soliciting done in connection with the mailing of the registration envelopes to be "legitimate agency function[s]" in their own right because the revenues thereby generated were used to fund public programs. *Id.* at 1223. In other words, the court determined that

none of Imagitas's uses of the personal information were impermissible. The Fourth Circuit's opinion in this case is the first to hold that a defendant who might have a future permissible use for a person's personal information is free to make impermissible use of it as well. The Fourth Circuit's version of the "inextricably intertwined" test, as adopted in this case, is in fact quite different from, and in conflict with, the Eleventh Circuit's holding in *Rine*, and its implementation has further muddled an already murky area of the law.

C. The dissent in *Pichler*, along with a Pennsylvania state court, have advocated for a standard under which use of personal information is permissible under the DPPA only if the "primary purpose" for such use is permissible.

Judge Sloviter dissented from the Third Circuit's opinion in *Pichler V*, arguing that UNITE's actions were lawful because "at least of one of [its] purposes for using the restricted information was in connection with investigation in anticipation of litigation." 542 F.3d at 402 (Sloviter, J., dissenting). While apparently conceding that UNITE also had the impermissible purpose of union organizing for its use of the information, Judge Sloviter disputed the majority's "conclusion that the presence of one unlisted purpose for obtaining the motor vehicle information overrides or cancels a listed purpose." *Id.* Instead, "[w]hen such cases are presented, [she] would . . . have the

fact-finder determine which is the primary purpose and whether that purpose was permitted under § 2721(b)." *Id.* If so, Judge Sloviter would deem the use to be lawful.

In *Hartman v. Department of Conservation and Natural Resources*, 892 A.2d 897 (Pa. Commw. Ct. 2006), the Pennsylvania Commonwealth Court[6] applied a test quite similar to the "primary purpose" test for which Judge Sloviter advocated. In *Hartman*, the defendant owner of a snowmobile magazine sought to obtain the personal information of registered snowmobile owners in Pennsylvania. He argued that, because one edition of the magazine contained articles on snowmobile safety, the information could be properly disclosed under section 2721(b)(2) of the DPPA, which permits disclosure of personal information "for use in connection with matters of motor vehicle or driver safety." *Id.* at 902. The court held that his request was properly denied because it was "clear the requested information would be used *primarily* to promote snowmobiling in Pennsylvania and membership in the [Pennsylvania State Snowmobile Association]." *Id.* at 905 (emphasis added). The court offered the following justification for

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[6] The Pennsylvania Commonwealth Court is an intermediate appellate court, rather than a "court of last resort," of the state of Pennsylvania. The Pennsylvania Supreme Court has not spoken on this issue; however, an examination of this case is useful to illuminate the confusion in state as well as federal courts concerning this area of the law.

denying Hartman's request based on an impermissible primary purpose:

> Hartman's proffered construction would be inconsistent with Congress' intent to limit disclosure of this personal information for "surveys, marketing, or solicitations" unless the individual has given the State "express consent" for such a disclosure. 18 U.S.C. § 2721(b)(12). Hartman intends to use this information to market snowmobiling and the PSSA, but the registrants have not consented to the release of their names for this use. Disclosure is prohibited.

Id. Thus, the court soundly rejected Hartman's attempt to conjoin his impermissible use for obtaining the information (marketing and solicitation) with a permissible use (promoting motor vehicle safety) as inconsistent with the letter and spirit of the Act.

D. Summary of the lower courts' tests.

No court except the Fourth Circuit has held that pure solicitation is permissible under the DPPA. Setting aside for the moment this new split that the Fourth Circuit has created among the lower courts, the already existing split (which the Fourth Circuit has contributed to) can be summarized as follows:

Third Circuit. The Third Circuit view, as articulated in the *Pichler* line of cases, is that the obtainment, disclosure, or use of personal information is unlawful under the DPPA if it is motivated by any

impermissible purpose, even if it is also motivated, in part, by a permissible purpose. *See Pichler V*, 542 F.3d at 395.

Eleventh Circuit. The Eleventh Circuit, on the other hand, considers a use of personal information lawful under the Act if the defendant has any permissible purpose for the use, even if he or she also has an impermissible purpose for the same use. *See Rine*, 590 F.3d at 1226.

Primary purpose test. Judge Sloviter, dissenting in *Pichler V*, and a Pennsylvania intermediate appellate court have endorsed a test whereby a defendant's use of statutorily-protected information is lawful if the "primary purpose" for the use is permissible.

Fourth Circuit. Finally, in this case, the Fourth Circuit has added a new voice to the cacophony. In the opinion below, the court advocated a test whereby an impermissible use of personal information is excused if it is "integral to, and inextricably intertwined with," a later permissible one. App. 29a. Of the four standards discussed, this is by far the least protective of personal information; none of the others go so far as to immunize *an entirely impermissible use* (that is, a use with no permissible purpose) so long as the personal information is later used for a permissible use.

CONCLUSION

This Court's guidance is necessary to resolve both splits that now exist regarding the proper construction of the DPPA. For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for certiorari.

Respectfully submitted,

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

EDWARD F. MARACICH, individually and on behalf of all others similarly situated; MARTHA L. WEEKS, individually and on behalf of all others similarly situated; JOHN C. TANNER, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

MICHAEL EUGENE SPEARS; MICHAEL SPEARS, PA; GEDNEY MAIN HOWE, III; GEDNEY MAIN HOWE, III, PA; RICHARD A. HARPOOTLIAN; RICHARD A. HARPOOTLIAN, PA; A. CAMDEN LEWIS; LEWIS & BABOCK, LLP,

Defendants-Appellees.

No. 10-2021

Appeal from the United States District Court for the District of South Carolina, at Spartanburg. Henry M. Herlong, Jr., Senior District Judge. (7:09-cv-01651-HMH)

Argued: December 8, 2011

Decided: April 4, 2012.

Before DUNCAN, DAVIS, and WYNN, Circuit Judges.

Affirmed by published opinion. Judge Davis wrote the opinion, in which Judge Duncan and Judge Wynn joined.

COUNSEL

ARGUED: Philip N. Elbert, NEAL & HARWELL, Nashville, Tennessee, for Appellants. Morris Dawes Cooke, Jr., BARNWELL, WHALEY, PATTERSON & HELMS, LLC, Charleston, South Carolina, for Appellees. **ON BRIEF:** James G. Thomas, W. David Bridgers, Elizabeth S. Tipping, NEAL & HARWELL, Nashville, Tennessee; Gary L. Compton, Spartanburg, South Carolina, for Appellants. E. Bart Daniel, Charleston, South Carolina, John B. White, Jr., HARRISON, WHITE, SMITH & COGGINS, P.C., Spartanburg, South Carolina, for Appellees; Curtis W. Dowling, BARNES, ALFORD, STORK & JOHNSON, LLP, Columbia, South Carolina, for Appellees Michael Eugene Spears and Michael Spears, PA; Craig E. Burgess, John W. Fletcher, BARNWELL, WHALEY, PATTERSON & HELMS, LLC, Charleston, South Carolina, for Appellees Gedney Main Howe, III, and Gedney Main Howe, III, PA; Charles E. Hill, TURNER PADGET GRAHAM & LANEY, P.A., Columbia, South Carolina, for Appellees Richard Harpootlian and Richard A. Harpootlian, PA.

Opinion

(Filed Apr. 4, 2012)

DAVIS, Circuit Judge:

This appeal arises from the dismissal of all claims alleged in a putative class action complaint filed pursuant to the Driver's Privacy Protection Act of 1994 (DPPA or the Act), 18 U.S.C. §§ 2721-2725, which "regulates the disclosure of personal information contained in the records of state motor vehicle departments." *See generally Reno v. Condon*, 528 U.S. 141, 148 (2000) (holding the DPPA constitutional as a proper exercise of Congress' power under the Commerce Clause).

Appellees Michael E. Spears, Esq., Gedney M. Howe, III, Esq., Richard A. Harpootlian, Esq., and A. Camden Lewis, Esq., ("the Lawyers" or Appellees) are South Carolina attorneys who in 2006 and 2007 instituted several "group action" lawsuits in South Carolina state court against numerous car dealerships pursuant to the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act ("Dealers Act"), S.C. Code Ann. § 56-15-10 *et seq.* They alleged that certain dealerships had collected unlawful fees from car buyers. Through requests submitted to the South Carolina Department of Motor Vehicles (DMV) under the state Freedom of Information Act, S.C. Code Ann. §§ 30-4-10 to -165 (FOIA), the Lawyers obtained "personal information" protected by the DPPA, *viz.*, the names, addresses, telephone numbers, and car purchase information of thousands of

car buyers, from which they identified potential named plaintiffs in the Dealers Act group action.

Appellants Edward F. Maracich, Martha L. Weeks, and John C. Tanner ("the Buyers" or Appellants) are car buyers who received mailings from the Lawyers regarding the Dealers Act litigation. In 2009, individually and on behalf of a putative class of all others similarly situated, the Buyers sued the Lawyers in this action in the United States District Court for the District of South Carolina alleging that the Lawyers violated the DPPA when they obtained and used the Buyers' personal information without their consent in connection with the Dealers Act litigation.

On cross-motions for summary judgment in the district court, the Buyers argued that the liability of the Lawyers was established as a matter of law because the Lawyers had obtained their personal information for use in a mass solicitation which, without the Buyers' consent, is prohibited by the DPPA. The Lawyers argued, to the contrary, that they obtained and used the Buyers' personal information for purposes that are permitted notwithstanding the absence of consent, most particularly, under the "litigation exception" to the DPPA's general prohibitions on the use of personal information. In a thorough opinion, the district court granted summary judgment in favor of the Lawyers, concluding that the Lawyers did not engage in prohibited solicitation but that, even if they did, their actions nonetheless satisfied the so-called "litigation" and "state action"

exceptions to the statutory prohibitions under the DPPA, and therefore their actions comported with the requirements of the Act. The Buyers have timely appealed from the adverse judgment.

Having carefully considered the record and the parties' contentions, in light of the plain language, purpose, and overall structure of the DPPA, we affirm the judgment, albeit on reasoning differing somewhat from that of the district court. Specifically, we hold that the district court erred in ruling that the Lawyers did not engage in solicitation. Yet, the Lawyers indisputably made permissible use of the Buyers' personal information protected by the DPPA, here, for use "in connection with [litigation]," including "investigation in anticipation of litigation." 18 U.S.C. § 2721(b)(4). Ultimately, the Buyers' damages claims asserted under the DPPA fail as a matter of law, notwithstanding the fact that the Buyers can identify a distinct *prohibited use* (mass solicitation without consent) that might be supported by evidence in the record. In short, where, as a matter of settled state law and practice, as here, solicitation is an accepted and expected element of, and is inextricably intertwined with, conduct satisfying the litigation exception under the DPPA, such solicitation is not actionable by persons to whom the personal information pertains.

I.

The issues presented arise out of the process and circumstances surrounding the Lawyers' efforts to investigate, and in due course to institute, claims cognizable in the Dealers Act litigation they filed in state court. Accordingly, we first set forth in some detail the facts and procedural history relevant to the state court litigation. We then proceed to describe the facts and procedural history of this action filed in federal district court. As the parties indicated in their cross-motions for summary judgment filed in the district court, the essential cardinal facts are undisputed.

A.

In early June 2006 the Lawyers were contacted by several persons who complained that local car dealerships were engaged in unfair practices. The pursuit of these potential claims led the Lawyers to make the first of a series of FOIA requests to the South Carolina DMV. The requests indicated to the DMV that information was being sought "in anticipation of litigation," under the DPPA provision commonly referred to as the "litigation exception," which authorizes a state DMV to disclose drivers' and/or car owners' "personal information":[1]

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[1] Under the Act, "personal information" is defined as:

> information that identifies an individual, including an individual's photograph, social security number, driver

(Continued on following page)

> for use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

18 U.S.C. § 2721(b)(4).

In the original FOIA request, Appellee Harpootlian explained to the DMV: "I have plaintiffs who have complained of certain conduct as a result of their transactions with car dealers, conduct which I believe to be a potential violation [of] state law. I am attempting to determine if this is a common practice, and am accordingly submitting this FOIA request." J.A. 206. The request was for information on "private purchases of new or used automobiles in Spartanburg County during the week of May 1-7, 2006, including the name, address, and telephone number of the buyer, dealership where purchased, type of vehicle purchased, and date of purchase." J.A. 206. Apparently satisfied that the litigation exception applied, the DMV provided the requested information.

> identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.

18 U.S.C. § 2725(3).

About one month later, Harpootlian made a second FOIA request to the DMV. This request likewise invoked the litigation exception of the DPPA and extended the inquiry to purchases of new or used cars in Charleston, Richland, York, Lexington, and Greenville counties for the week of May 1-7, 2006. Again, the DMV provided the requested information.

It is undisputed that at the time of these first two FOIA requests (despite Harpootlian's reference to "plaintiffs who have complained of certain conduct") the Lawyers had not yet filed an action under the Dealers Act or otherwise. Just days after the second FOIA request, however (and presumably before it was answered), the Lawyers filed in state court a Dealers Act case referred to by the parties and the district court as the *Herron* litigation, alleging violations by 51 car dealerships.[2] The suit was filed on behalf of four named plaintiffs and "for the benefit of all others," J.A. 220; *see* S.C. Code Ann. § 56-15-110 (providing that "when such action is one of common or general interest to many persons or when the parties

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[2] The Dealers Act prohibits automobile dealerships from engaging in "any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or the public." S.C. Code Ann. § 56-15-40. The specific allegation in *Herron* was that dealerships deceptively grouped "administrative fees" on invoices with taxes and other required fees to mislead purchasers into believing that the charges were mandatory and non-negotiable. The suit requested permanent injunctive relief, disgorgement of all fees to all purchasers who paid them, double actual damages, litigation costs and attorney's fees, and punitive damages.

are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.").

Immediately following the filing of the complaint in *Herron*, various defendant dealerships filed motions to dismiss on the ground that they had not sold cars to any of the four named plaintiffs, who therefore lacked standing. With these motions pending, Harpootlian submitted a third FOIA request to the DMV in October 2006, again citing the litigation exception, in which he requested the personal information and types of vehicles purchased for people who bought cars from 328 listed dealerships between May 1 and May 14, 2006. Included on the list were those dealerships that had filed motions to dismiss for lack of standing in the *Herron* litigation. Again, the DMV complied with the request.

On October 31, 2006, the Lawyers filed an amended complaint in the *Herron* litigation, which added four named plaintiffs to the suit and increased the number of defendant dealerships from 51 to 324. As with the original complaint, defendant dealerships that had not engaged in transactions with any of the now eight named plaintiffs filed motions to dismiss for lack of standing. In all, more than 183 motions to dismiss were filed.

On January 3, 2007, the Lawyers mailed the first of another series of letters to the car buyers identified through the FOIA requests. The first letter was

prefaced, just below the letterhead, with the phrase: ***ADVERTISING MATERIAL.*** J.A. 487. The letter stated, in its entirety:

> We represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee." We believe that these fees are being charged in violation of South Carolina law.
>
> We understand that you may have been charged one of these fees on your recent purchase of an automobile. ***We obtained this information in response to a Freedom of Information Act request to the South Carolina Department of Motor Vehicles.***
>
> ***The exact nature of your legal situation will depend on facts not known to us at this time. You should understand that the advice and information in this communication is general and that your own situation may vary.*** However, we would like the opportunity [to] discuss your rights and options with you in a free consultation. If you are interested in participating in the case or in a free consultation, please mail the enclosed postage paid card and we will contact you soon.
>
> ***You may wish to consult your lawyer or another lawyer instead of us. You may obtain information about other lawyers***

> ***by consulting the Yellow Pages or by calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer.***

J.A. 487 (emphases in original). The Lawyers filed a copy of the letter and a list of recipients' names and addresses with the South Carolina Office of Disciplinary Counsel, as required by South Carolina Rule of Professional Conduct 7.3, which regulates the solicitation of prospective clients. The emphasized text of the third and fourth paragraphs, and the prominent placement of the phrase "advertising material," complied with the provisions of Rule 7.3, as well. *See* S.C.R. Prof. Con. 7.3(d)(1), (2).

Later in January 2007, Harpootlian made two more FOIA requests of the DMV, seeking personal information of people who had purchased cars between June 1 and September 2, 2006, from an additional 31 dealerships. Then, Harpootlian submitted the final FOIA request on January 23, 2007, requesting personal information and dealership information for all purchasers of new and used cars during September 1-14, 2006, and December 10-24, 2006. The three requests again cited only the litigation exception to the DPPA and all were granted by the DMV.

On the same day as the last FOIA request, the Lawyers mailed a second round of letters to car

buyers whose personal information had been disclosed by the DMV. These letters, which differed from the first mailing only by minor formatting changes, were sent to 1,283 people. Meanwhile, in state court, various defendant dealerships filed a Joint Memorandum to Dismiss, again asserting that "for every named Dealer, there had to be a corresponding named Consumer who was a customer." Appellees' Br. 8; J.A. 666.

In March 2007, the Lawyers mailed two more rounds of letters to a total of 21,116 purchasers identified through the FOIA requests. Shortly thereafter, counsel for some of the dealership defendants in *Herron* wrote to the Lawyers, asserting that the FOIA requests and subsequent mailings violated a state law generally prohibiting certain solicitations based on information obtained from state agencies, but not mentioning the DPPA. The Lawyers responded by invoking the DPPA and reiterating that the litigation exception to the DPPA applied to their FOIA requests. The Lawyers further asserted that the letters mailed to car buyers had been made to conform to the requirements of a client solicitation under the South Carolina lawyer disciplinary rules only because "we knew that your group would try to see if we had met the requirements of the Disciplinary Counsel. In an abundance of caution we followed the requirements." J.A. 337. The Lawyers asserted that no violation of state law regarding prohibited solicitation had occurred because "we are not marketing or selling a consumer product or service." *Id.*

In March 2007, Appellant Maracich received one of the letters mailed to car buyers by the Lawyers. While his personal information had been disclosed to the Lawyers because he was one of many buyers from a particular dealership, Maracich also happened to be the Director of Sales and Marketing at that dealership.

Two months later, the Lawyers sent two rounds of letters to a total of 11,547 car buyers identified from the FOIA requests. Appellants Martha Weeks and John Tanner allege that they received letters from the Lawyers around this time. According to Tanner, after receiving the letter he called Harpootlian to find out how his contact information was obtained. During the conversation, he was subjected to "an aggressive sales pitch" to "sign up as a client for a lawsuit," and was told that he could receive "two to three times" the fee amount he had paid at purchase. J.A. 1448. Tanner further avers that during this conversation, Harpootlian never asked about the circumstances of his purchase.

In June 2007, in response to continuing disputes over standing in the *Herron* litigation, the Lawyers moved to further amend their Amended Complaint to join nearly 250 additional named plaintiffs who had come forward in response to the mailings. The dealerships opposed the motion, now arguing that the proposed additional plaintiffs had been contacted in violation of the DPPA. The state court ultimately denied the motion to amend, and ruled that the

named plaintiffs had standing only as to dealerships with which they had engaged in transactions.[3]

Consequently, in September 2007, the claimants who had been denied joinder in *Herron* brought independent actions in state court, which were then consolidated with *Herron*. All claims against dealerships without a corresponding plaintiff-purchaser were dropped in the interest of foreclosing any further controversy over standing.

Addressing another Motion to Substitute a plaintiff, the state court in the *Herron* litigation in October 2009 reiterated a number of key rulings in the case up to that point: (1) the plaintiffs had "a substantive statutory right . . . to proceed 'for the benefit of the whole' . . . 'without a requirement that the plaintiff plead and prove the class certification requirements under S.C.R.P. Rule 23'"; (2) "each named Plaintiff had standing to sue for himself and in a representative capacity for other[s] against the Defendant that transacted business with that named Plaintiff"; (3) "This is not a Rule 23, SCRP class action. This is a group representative action under the Dealers Act. . . . Nothing in the Dealers Act requires the Plaintiffs to move for class certification"; and (4) "Plaintiff's counsel, as private attorneys general, from the inception

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[3] The court further ruled, however, that the existing plaintiffs could acquire standing as to any defendant that was shown by discovery to have joined a conspiracy to charge improper fees.

of this litigation have represented the public interest in attempting to regulate allegedly unfair practices . . . and therefore represent all those affected by such practices." J.A. 1354, 1355, 1357.[4]

B.

Nearly three years after the *Herron* litigation commenced, the Buyers (who are represented in this case by the same counsel who represents several of the dealerships in the *Herron* litigation) filed the

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[4] The long-pending *Herron* litigation has had something of a tortuous journey. When the trial court denied the dealerships' motion to compel arbitration, the dealerships took an interlocutory appeal. The Supreme Court of South Carolina granted certification, brought up the appeal from the Court of Appeals, and reversed in part and affirmed in part the trial court's ruling, concluding, ultimately, that although the arbitration clause at issue was otherwise enforceable, its prohibition on class arbitration violated the public policy of South Carolina. *See Herron v. Century BMW*, 693 S.E.2d 394 (S.C. 2011). Upon the filing by the dealerships of a petition for *certiorari*, the United States Supreme Court granted the writ, vacated the judgment, and remanded the action to the South Carolina Supreme Court for reconsideration in light of *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that California state law rule that prohibited a waiver of class arbitration in a retail sales contract was preempted by the Federal Arbitration Act). Upon the South Carolina Supreme Court's reconsideration of *Herron* after the remand, the court held that the dealerships had forfeited the argument that the class arbitration bar under the public policy of South Carolina was preempted by the Federal Arbitration Act by failing to raise it in the trial court or before the South Carolina Supreme Court in the interlocutory appeal. *Herron v. Century BMW*, 719 S.E.2d 640 (S.C. 2011).

instant putative class action against the Lawyers, alleging violations of the DPPA related to the acquisition and use of the Buyers' personal information from DMV records through the Lawyers' FOIA requests. The Complaint asserted damages claims under 18 U.S.C. § 2724(a). Specifically, the Buyers alleged that the Lawyers unlawfully obtained personal information as defined by the DPPA, 18 U.S.C. § 2725(3), *see supra* n.1, by knowingly requesting, "under false pretenses," information for the prohibited use of solicitation, "and then using the Personal Information for the statutorily prohibited purpose of mailing lawyer advertising and solicitation materials to Plaintiffs." J.A. 19. The Buyers sought liquidated damages of $2,500 for each instance of unlawful conduct, compensatory and punitive damages, a permanent injunction, attorney's fees and costs, and interest on the monetary awards.[5]

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[5] Section 2724 provides:

(a) Cause of action. – A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) Remedies. – The court may award –

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(Continued on following page)

The Lawyers promptly moved to dismiss all counts in the Complaint, arguing (among other issues) that the Buyers' personal information was obtained for the permissible use provided in 18 U.S.C. § 2721(b)(4), the litigation exception, and in 18 U.S.C. § 2721(b)(1), the state action exception.[6] The motion also argued that the Lawyers "already represented" the people they had contacted using the DMV information by virtue of the group action under the Dealers

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(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

18 U.S.C. § 2724. *See Condon*, 528 U.S. at 146-47 (stating that the § 2724(a) cause of action is for knowingly obtaining, disclosing, or using personal information "for a use other than those specifically permitted by the DPPA"). The Buyers alleged four separate counts in their Complaint, all arising under the DPPA, against all four of the Lawyers (and their respective law firms), and seemingly resting on the following separate theories: (1) willful violations of the DPPA; (2) negligent violations of the DPPA; (3) respondeat superior liability, generally; and (4) concert of action, generally.

[6] The so-called "state action" exception under the DPPA provides as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, *or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.*

18 U.S.C. § 2721(b)(1) (emphasis added). The Lawyers argued that, in their role as "private attorneys general" under the Dealers Act, the state action exception applied to their FOIA requests leading to, and facilitating, the *Herron* litigation.

Act, and the attorneys had moreover been "obligated" to find and contact buyers to ensure that the suit was not dismissed on standing grounds as to certain members of that group.

In addition, the Lawyers noted that the lead counsel for the Buyers in the instant case also represented several of the defendant dealerships in *Herron*. They argued that this relationship created a conflict of interest, and that representation of the Buyers in federal court by the dealerships' attorneys should be prohibited in any event because to the extent that the Buyers were members of the plaintiff group in *Herron*, they were already represented by the Lawyers. In sum, the Lawyers charged that the DPPA litigation was an "obstructionist legal tactic," designed to undermine the *Herron* litigation. J.A. 158.

The district court rejected each of the Lawyers' arguments for dismissal. The court ruled, in pertinent part, that the existence of an attorney-client relationship between the Lawyers and buyer group members in *Herron* was a disputed factual issue and thus the litigation exception to the DPPA did not apply at the motion-to-dismiss stage, and that the state action exception did not apply because the Lawyers, though acting as "private attorneys general" in a group action context, were not for that reason alone agents of the government. Furthermore, the court admonished that any assertion regarding the impropriety of the representation of the class should

be expressed in a motion to disqualify counsel on the ground of conflict of interest.

In their Answer and Counterclaim, the Lawyers asserted, in effect, that this action was proof of the sports aphorism that the best defense is an aggressive offense: "This is now clearly seen as a multi-million dollar-fear lawsuit designed to interfere with and discover the legal bases of an underlying lawsuit involving consumers against car dealers and their illegal charging of secret fees. It is designed to chill, if not kill, an ongoing legitimate lawsuit." J.A. 175. After alleging a host of affirmative defenses, the Lawyers requested by way of their counterclaim a declaratory judgment that the DPPA's solicitation provision does not apply to permissible litigation-related uses of personal information. Such a construction was proper, they argued, because "Congress intended for lawyers to have unfettered access and use of DMV information for use in litigation." J.A. 189.

Discovery commenced, haltingly, but on January 25, 2010, the district court addressed the Lawyers' Motion to Stay, which argued that discovery would involve documents from the *Herron* litigation that fall within the attorney-client and work product privileges, and should therefore be stayed while that case proceeded. Agreeing that there were "numerous privilege issues" at stake, the district court ordered a six-month stay in the federal DPPA action, suspending discovery. J.A. 196.

Just weeks later, the Buyers moved to lift the stay to undertake class certification discovery under Fed. R. Civ. P. 23. Following a hearing, during which the Lawyers "stated that they could file a motion for summary judgment without the need for any discovery," J.A. 203, and the Buyers stated that discovery would likewise be unnecessary to prepare their response to such a motion and their own motion, the district court denied the motion to lift the stay with the expectation that summary judgment proceedings would proceed.

The Buyers and the Lawyers promptly filed cross-motions for summary judgment only three days apart; the former sought a partial summary judgment on liability only, and the latter sought judgment in full as to all of the Buyers' claims, relying on several theories. The Lawyers made essentially the same arguments they had asserted in their unsuccessful Motion to Dismiss.[7] This time, however, the district court was receptive.

The court first addressed the Buyers' argument that the Lawyers had provided no sworn statements as to their subjective intent regarding the FOIA requests and car buyer mailings, and relied instead solely on the *Herron*-related pleadings and other

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[7] The Buyers' motion urged the court to rule that acquisition and use of information under the DPPA must both (1) meet all the requirements of permissibility and (2) avoid any impermissible categorization. The district court addressed the cross-motions together, as discussed above.

documents to establish the purpose of their conduct in seeking the Buyers' personal information. The court rejected the Buyers' argument, noting that the Buyers were themselves relying on the documents related to the *Herron* litigation in support of *their* motion, and that the *Herron*-related filings were of unquestioned authenticity, legally sufficient, and ultimately, highly probative regarding the issues before the court; the documents were therefore a proper basis on which to resolve the motions for summary judgment.

Addressing the somewhat unusual nature of the Lawyers' relationship to the group of buyers in *Herron,* the court explained that under the state court ruling in the *Herron* litigation, there is a "substantive right to representation for the 'benefit of the whole'" provided by the Dealers Act, and therefore the Lawyers' status in the *Herron* litigation was "distinct yet analogous to attorney representation in a class action under [South Carolina's class action provision]." J.A. 1475. In light of the unique representative function under group action, the Lawyers had at least a fiduciary duty to all buyers affected by the Dealers Act violations alleged. As a result, the court ruled, "The [Lawyers] did not solicit unnamed buyers as a matter of law." J.A. 1477.[8]

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[8] Concluding that "the undisputed facts" indicated permissible uses of the information, J.A. 1491, and noting that compliance with the state solicitation rules in the wording of the FOIA requests was reasonable and did not make the letters solicitation per se, the court concluded that there was no plausible basis on which to find that the DPPA had been violated.

The court then ruled broadly that even where the acquisition and use of personal information does fall within the solicitation prohibition of the DPPA (for want of the express consent of the persons to whom the personal information pertained), such conduct is nonetheless lawful under the DPPA in the absence of consent if it also comes within one of the permitted use provisions. In this regard, the court rejected the Buyers' reliance on the reasoning of *Pichler v. UNITE,* 542 F.3d 380 (3d Cir. 2008), and *Wemhoff v. District of Columbia,* 887 A.2d 1004 (D.C. Ct. App. 2005), and followed instead, as urged by the Lawyers, the Eleventh Circuit's reasoning in *Rine v. Imagitas, Inc.,* 590 F.3d 1215 (11th Cir. 2009).

The court specifically ruled that the acquisition and use of the car buyers' personal information before the *Herron* action was filed met the "investigation in anticipation of litigation" permitted use of 18 U.S.C. § 2721(b)(4), and that the acquisition and use of the car buyers' personal information after the commencement of that action were "in connection with [a] civil . . . proceeding," as also permitted by the litigation exception. Despite its rejection of the argument when it was raised in the earlier motion to dismiss, the court also ruled that the Lawyers' conduct was lawful under the state action exception of the DPPA because their role in *Herron* was adequately analogous to that of a state attorney general. Summary judgment was therefore granted in favor of the Lawyers and all the Buyers' claims were dismissed with prejudice, as was the Lawyers' counterclaim, as moot.

II.

The Buyers timely appealed and now argue before us that the district court erred in its ruling on three issues, namely, in concluding that: (1) as a matter of law, the Lawyers' conduct did not constitute solicitation under the DPPA; (2) conduct in obtaining and using personal information under the DPPA is lawful and non-actionable, even where that conduct also evidences an impermissible use; and (3) the Lawyers' conduct came within either the litigation or state action permissible use exceptions of the DPPA. We agree with the Buyers that the district court erred in concluding that no solicitation within the contemplation of the DPPA was shown. Nevertheless, we affirm the district court's determination that despite the evidence of non-consensual solicitation, the summary judgment record establishes as a matter of law that the Lawyers' conduct in obtaining and using the Buyers' personal information fell within a permissible use under the DPPA, the litigation exception, and that, under the circumstances of this case, the Buyers' claims fail as a matter of law because the solicitation was integral to, and inextricably intertwined with, conduct clearly permitted by the litigation exception.[9]

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[9] In light of our holding that the litigation exception applied to the Lawyers' conduct and forecloses the Buyers' claims, we have no occasion to review the district court's alternative ruling that the state action exception also applies under the circumstances of this case.

A.

We review the grant of summary judgment *de novo*. *News & Observer v. Raleigh-Durham Airport*, 597 F.3d 570, 576 (4th Cir. 2010). As provided by Fed. R. Civ. P. 56(c)(2), summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."

> Facts are "material" when they might affect the outcome of the case, and a "genuine issue" exists when the evidence would allow a reasonable jury to return a verdict for the nonmoving party. The moving party is "entitled to judgment as a matter of law" when the nonmoving party fails to make an adequate showing on an essential element for which it has the burden of proof at trial. "[I]n ruling on a motion for summary judgment, the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor." *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (internal quotations omitted). To overcome a motion for summary judgment, however, the nonmoving party "may not rely merely on allegations or denials in its own pleading" but must "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e).

News & Observer, 597 F.3d at 576 (some citations omitted).[10] Similarly, "[t]he district court's analysis of the statutes in the instant case presents questions of law which we review *de novo*." *WLR Foods, Inc. v. Tyson Foods, Inc.*, 65 F.3d 1172, 1178 (4th Cir. 1995), *cert. denied*, 516 U.S. 1117 (1996).

B.

The first issue before us concerns construction of the word "solicitation," as it appears in the DPPA's list of enumerated "permissible uses" of DMV information: "Personal information . . . may be disclosed . . . for bulk distribution for surveys, marketing, or solicitations if the State has obtained the express consent of the person to whom such personal information

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[10] In their statement of the Standard of Review, the Buyers briefly raise the argument that "a court cannot, as in this case, grant summary judgment while denying the nonmoving party discovery of documents or the right to take witness or party depositions regarding facts deemed material under its interpretation of the law." Appellants' Br. 21-22. The record indicates quite clearly, however, that the Buyers agreed they would not need discovery to file an adequate opposition to a motion for summary judgment, if it involved only the same arguments offered in the motion to dismiss. J.A. 201-02. The two motions did ultimately rely on the same arguments, based on references to the undisputed facts (arising from the existence of readily-available documents whose authenticity was unquestioned) from *Herron*. Because the Buyers waived their right to discovery before the district court entertained the motion for summary judgment, the district court did not abuse its discretion in adjudicating the motion on the record presented by the parties without the benefit of full discovery.

pertains." 18 U.S.C. § 2721(b)(12). The district court ruled that the mailings by the Lawyers were not solicitations for the purposes of the DPPA as a matter of law because of the Lawyers' actual, if inchoate, representative relationship to all members of the *Herron* group of consumers. The Buyers argue this ruling was erroneous for two reasons: (1) the plain, express language of the letters – which conformed to South Carolina's requirements for solicitation by attorneys, and were therefore labeled clearly "ADVERTISING MATERIAL" – indicates that they were, in fact, solicitations, and (2) the Lawyers did not have an attorney-client, or representative, relationship with the contacted buyers and thus communication with these people was solicitation insofar as the recipients were potential clients, not actual clients.

In essence, the Buyers are arguing for an objective standard for defining solicitation: the letters looked like solicitations, conformed to the requirements for solicitations, and they accomplished the aim of solicitations, i.e., finding potential named plaintiffs for the *Herron* litigation. In ruling that the letters were not solicitations, the district court instead applied a subjective standard, taking into primary account the motives of the Lawyers and the context in which their requests were made.

Without question, the South Carolina solicitation regulations for "Direct Contact with Prospective Clients," to which these letters conformed, are explicitly designed to protect recipients from overtures that might be overwhelming, confusing, misleading,

or against their best interests. *See* S.C.R. Prof. Con. 7.3, cmts. 1, 5, 8; *see also Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) (noting the acceptability of restrictions on legal advertising to avoid misleading prospective clients). These concerns focus on the perception of the reader or listener, not the intentions of the attorney or the particular context in which the conduct occurs. In our view, an objective standard best protects these interests because it prevents the dissemination of material that is likely to cause confusion or misguided reliance.

The Lawyers explain their compliance with the South Carolina Rules of Professional Conduct as simply "an abundance of caution," rather than an indication that the letters constituted solicitation in fact. But the Lawyers' contention proves too much; caution was needed because, viewed objectively, the mailings constituted "solicitations." Their argument that their role in *Herron* as ostensible private attorneys general, allegedly ratified by the state court rulings described above, conferred the rights and duties of counsel on them and therefore any communication with group members (named or unnamed in the suit at the time) is unpersuasive. There is no inherent inconsistency between their role, even if true, as private attorneys general, on the one hand, and their need to "solicit" potential clients, on the other hand. By denoting the letters as "advertising material," a reasonable recipient would almost certainly have understood the message to be a solicitation from a lawyer.

Even more important than the boilerplate solicitation language, the letter encouraged recipients to respond in order to learn about their rights and "to participate in the case." J.A. 487. No mention was made of an investigation into certain practices other than the implicit suggestion of investigation during a "free consultation." J.A. 487. The letters also failed to indicate to recipients that they may already be *de facto* clients of the Lawyers, that is, persons whose interests were already protected by the senders. In short, the Lawyers presented their communication as solicitation, whether they believed it (then or now) to be or not.

Thus, we apply an appropriately consumer-protective objective standard for construing the DPPA term "solicitation." Accordingly, and consistent with the common understanding of the meaning of the word as targeted lawyer advertising aimed at affording representation to potential clients, *see, e.g., Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988) (evaluating constitutional propriety of state's ban on "targeted, direct-mail solicitation," and noting that while such solicitation "presents lawyers with opportunities for isolated abuses or mistakes,. . . . [t]he State can regulate such abuses and minimize mistakes through far less restrictive and more precise means [than a total ban], the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, . . . giving the State ample opportunity to supervise mailings and penalize actual abuses"); *see also Ficker v. Curran*, 119 F.3d 1150 (4th

Cir. 1997), we are constrained to reject the district court's conclusion that, as a matter of law, the Lawyers were not engaged in solicitation when they contacted otherwise unknown car buyers they had identified through their FOIA requests.

As the district court correctly recognized, however, this determination is not dispositive. As we explain within, although the record supports the Buyers' contention that the Lawyers engaged in solicitation, i.e., that they induced the DMV to disclose the Buyers' personal information in the absence of the Buyers' consent, because the solicitation was entirely consistent with state law, was integral to, and was, indeed, inextricably intertwined with the Lawyers' permissible use of the Buyers' personal information pursuant to the litigation exception, the Buyers' claims fail as a matter of law.

C.

The Buyers' second argument is equally as straightforward as their first but far less persuasive. They contend that the district court erred in ruling that, as a matter of law, the nonconsensual use of personal information for solicitation is nonetheless non-actionable under 18 U.S.C. § 2724, *see supra* n.5, if the solicitation is sufficiently tied to a permissible use under the litigation exception. In other words, and more generally, the Buyers urge a theory of DPPA liability in which *any* impermissible use of personal information, e.g., solicitation absent consent, would

violate the statute (and support a damages action), even if, concomitantly, the personal information is put to a permissible use, i.e., in litigation.

For the reasons explained below, without undertaking to lay down a rule applicable in all future cases, we are persuaded that the most rational resolution of the manifest tension between the solicitation and litigation exceptions under the DPPA compels us to reject the Buyers' absolute rule.

There is no Fourth Circuit precedent teaching how to reconcile, or read harmoniously, the permissible use provisions of the DPPA, and indeed, the limited number of cases among our sister circuits reflect that the law in this area is in a state of continued evolution. *See generally,* Deborah F. Buchman, *Annotation, Validity, Construction, and Application of Federal Driver's Privacy Protection Act, 18 U.S.C.A. §§ 2721 to 2725,* 183 A.L.R. Fed. 37 (2011).

That said, we note that the Eleventh Circuit has provided a rather expansive sweep to the litigation exception of the DPPA. In *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.,* 525 F.3d 1107 (11th Cir. 2008), the court affirmed a summary judgment in favor of a law firm that had obtained the plaintiff's personal information from the Florida Department of Highway Safety and Motor Vehicles. The defendant lawyer had obtained the plaintiff's personal information (together with that of 24,000 other Florida drivers)

> because the automobile dealers he was litigating against were asserting that plaintiffs needed to plead and prove multiple acts of deceptive and unfair trade practices to state a deceptive and unfair trade practice claim under Florida law. . . . [T]he information was [then] used to send one-thousand "Custom and Practice" letters, which aimed at obtaining evidence showing a custom and practice of deceptive acts engaged in by dealerships.

Id. at 1114 (footnote omitted). The court rejected the plaintiff's argument that the lawyer's distribution of "Custom and Practice" letters to certain car buyers supported a claim based on impermissible use, i.e., prohibited solicitation. Specifically, the court reasoned:

> as the district court rightly determined, the fact that many records were retrieved, but only a comparatively small number were used for Custom and Practice letters did not, by itself, raise a genuine issue of material fact as to whether the litigation clause applied. By affixing significance solely to the number of records relating to letters sent out, [plaintiff] overlooked that [defendant's] initial review of the total amount of records is just as much tied to "investigation in anticipation of litigation" as the eventual sending out. [Plaintiff] failed, however to discredit, or even address, the initial review.

Id. at 1115. Moreover, in considered *dicta*, the court gave short shrift to the plaintiff's complaint that the

attorney's "ulterior motive" in obtaining the DPPA personal information was for use in potential *future* litigation.[11] We can discern no inconsistency between the evident Congressional purpose in the enactment of the DPPA of protecting privacy and the kind of pragmatic approach to lawyer access to protected personal information revealed by the Eleventh Circuit's understanding of the litigation exception.

Consistent with its willingness to afford the litigation exception a pragmatic scope as reflected in *Thomas*, the Eleventh Circuit has also shown its willingness to adopt a pragmatic reconciliation of the tension arising from the DPPA's prohibition (absent express consent) on solicitation when solicitation is inextricably intertwined with a permitted use

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[11] The court stated:

> Thomas also argues that a particular excerpt from Hartz's deposition indicates a "second ulterior motive" for obtaining the vehicle records; i.e., they were obtained for the purpose of creating a database of witnesses for prospective, not-yet-filed litigation – as opposed to currently pending cases. Our review of the record reveals that Thomas did not raise this particular argument below and, as such, the argument is waived. *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998). Nonetheless, the argument is without merit. The litigation clause refers to investigation in anticipation of litigation. Thus, even if the accumulation of potential witnesses related, in part, to certain cases not yet filed, we do not see how pre-suit investigation can be considered per se inapplicable to the litigation clause.

525 F.3d at 1115 n.5.

under 18 U.S.C. § 2721(b). *See Rine v. Imagitas*, 590 F.3d 1215, 1226 (11th Cir. 2009) (holding that non-consensual solicitation that is inextricably intertwined as a matter of state statutes with the state action exception is not actionable).

In *Rine*, in which the Judicial Panel on Multi-district Litigation consolidated actions brought by drivers in several states, the state of Florida contracted with a marketing enterprise to mail driver's license renewal information. *Id.* at 1219. Pursuant to its agreement with the state, and consistent with prior revenue-generating schemes pursued by the state and several Florida counties, the contractor included in the driver's license renewal mailings focused commercial advertising materials to such drivers, based on information contained in and derived from DPPA-protected personal information. *Id.* at 1219-20. Some drivers sued, among others, the contractor, as the Buyers here have sued the Lawyers, alleging a violation of the DPPA insofar as the state had failed to obtain their consent for the solicitation. In opposing the plaintiffs' claims, the contractor relied on the state action exception, arguing that it was performing functions on behalf of the state (which exercised final approval over the advertising material).

In sustaining the district court's legal conclusion that the state action exception foreclosed the plaintiffs' claims, the Eleventh Circuit reasoned that "nothing in the DPPA suggests that the (b)(12) [solicitation] exception alters the scope or meaning of the separate and independent [state action] exception

found in subsection (b)(1)." That is, where two provisions overlap but "both apply to situations not governed by the other," they "both must be given effect unless they 'pose an either-or proposition.'" *Id.* at 1226 (citing *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253 (1992)). The *Rine* court reasoned that unlike *HCSC-Laundry v. United States,* 450 U.S. 1 (1981), where as between two potentially applicable statutory provisions one was "general" and the other "specific," the DPPA provisions are equally specific. *Rine,* 590 F.3d at 1226. They are, moreover, "not mutually exclusive, meaning any one or more of them may be applicable to a given situation." *Id.* This reasoning commends itself to us.

The Buyers contend that the Eleventh Circuit's resolution of the tension between the solicitation prohibition and the permitted uses spelled out in § 2721(b) that do not require consent is misguided and urge us to adopt, instead, the holding of the Third Circuit in *Pichler v. UNITE,* 542 F.3d 380 (3d Cir. 2008) ("*Pichler V*" per the Appellants).[12] In *Pichler V,* the

[12] *Pichler v. UNITE,* a class action concerning a union's use of DMV information to contact employees for organizing drives and to pursue impact litigation, has generated at least seven opinions to date. The Third Circuit's numbering for the series of opinions related to the case does not match the numbering set out in the Appellants' Brief; the Appellants mark a 2004 decision denying a motion to dismiss as "*Pichler I,*" while the Third Circuit starts its count with a subsequent 2005 opinion certifying the class. *Compare Pichler,* 542 F.3d at 385, *with* Appellants' Br. 30 n.5. To minimize confusion between the briefs before this court and our opinion, we will follow the Appellants' numbering.

court affirmed summary judgment of liability against the union defendants in a DPPA case, agreeing with the lower court that "[t]he [DPPA] contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permissible [use]." *Id.* at 395 (citing *Pichler v. UNITE*, 446 F. Supp. 2d 353, 367 (E.D. Pa. 2006) ("*Pichler III*")). The lower court had reasoned that because the DPPA imposes liability for acquisition and use of information "for a purpose not permitted," *any* impermissible use was actionable, regardless of other circumstances supporting a finding that a permissible use provision was also satisfied. *Pichler III*, 446 F. Supp. 2d at 367. But we find that *Pichler* is plainly distinguishable from the facts and circumstances in the case at bar.[13]

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[13] The Buyers also seek solace in *Wemhoff v. District of Columbia*, 887 A.2d 1004 (D.C. Ct. App. 2005), in which a lawyer attempted to compel disclosure of DMV information about drivers ticketed for red light camera infractions at a particular intersection, when he did not yet represent any affected person and had no on-going "investigation" of red-light cameras beyond his attempt to find out the identities of those who had been ticketed. The *Wemhoff* court sustained the agency's refusal to make the disclosure, finding the request was for use in solicitation rather than in anticipation of litigation, and was therefore subject to the express consent requirement of section (b)(12).

Wemhoff held that "in anticipation of litigation" meant use for "the type of background work or search for material which would determine, substantively, whether one has a viable theory of litigation, or enough of a basis to avoid a motion for sanctions that a frivolous lawsuit has been filed." 887 A.2d at 1011-12. This test for attenuation was adopted from the district court's opinion in *Pichler*, which reasoned that the exception applied only where defendants could prove "(1) they undertook an actual

(Continued on following page)

There, the union conceded that it obtained the workers' personal information for a non-permitted use: union organizing. It somewhat belatedly and unpersuasively argued that its union organizing activities could not be disaggregated from its litigation activities. The Third Circuit majority emphatically rejected this argument.[14]

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investigation; (2) at the time of the investigation, litigation appeared likely; and (3) the protected information obtained during the investigation would be of 'use' in the litigation . . . " *Wemhoff*, 887 A.2d at 1011 (citing *Pichler v. UNITE*, 339 F. Supp. 2d 665, 666 (E.D. Pa. 2004) ("*Pichler I*")). On appeal, however, the Third Circuit pointedly noted that it "need not address the District Court's interpretation of the litigation and the acting on behalf of the government exceptions." 542 F.3d at 395.

We find that *Wemhoff* is plainly distinguishable from this case because, as the court in that case indicated, the lawyer was merely trolling for clients in the hope that litigation might be in the offing.

[14] The court could not have been more clear:

> The litigation component to UNITE's campaign should not obscure what UNITE was trying to accomplish-organizing labor. The same may be said for its acting on behalf of the government purpose. UNITE candidly admits that it launched the "campaign to organize and unionize Cintas workers." App. 226. Moreover, the organizers themselves, in conducting their home visits, unambiguously explained that they were "organizing a union campaign against Cintas." App. 238. Regardless of UNITE's attempts to mask this clear labor-organizing purpose behind the veil of a litigation purpose or an acting on behalf of the government purpose, Congress has not permitted UNITE to do so.

542 F.3d at 395-96.

At bottom, we easily conclude from these somewhat conflicting approaches to the DPPA that the Eleventh Circuit's approach provides the better reasoned interpretation of the Act under the facts and circumstances of the instant case. Just as the Florida statutes in *Rine* clearly authorized solicitation in connection with the state's license renewal schemes, South Carolina law and legal ethics norms not only permitted the type of solicitation engaged in by the Lawyers here, but in the context of the particular investigation and incipient litigation they pursued under the Dealers Act, contact with potential clients was entirely consistent with a pragmatic understanding of the litigation exception under the DPPA.

The DPPA provides, "It shall be unlawful for any person knowingly to obtain or disclose information, from a motor vehicle record, for any use not permitted under Section (b) of this title." 18 U.S.C. § 2722. Thus, the DPPA makes unlawful "any use not permitted" in subsection (b). In *Pichler,* where the DPPA defendant claimed to have obtained information for two entirely distinct uses (union organizing, not a permitted use, and in anticipation of litigation, a permitted use), the court rejected the union's disingenuous attempt, admitting of only marginal coherence, to marry an unpermitted use with a permitted one. In contrast, the Lawyers here always had only one use as their purpose, i.e., litigation, litigation that at all times of their conduct was either imminent or ongoing. The Lawyers' satisfaction of the state solicitation requirements was inextricably intertwined

with their intended permitted use of the personal information they obtained. *See Ficker,* 119 F.3d at 1153 (noting that "the Supreme Court observed in *Bates* that the dissemination of advertising information to the public had the potential to contribute substantially to fair legal process. . . . Similarly, in *Peel,* 496 U.S. 91, 110, 110 S.Ct. 2281, 2293, the Court noted that such advertising 'facilitates the consumer's access to legal services and thus better serves the administration of justice' ").

In such circumstances, we agree with the *Rine* court that full effect should be given to the permissive uses protected by the litigation exception. To hold otherwise would effectively transform the DPPA's phrase, "any use not permitted," into "use not permitted for any reason" – a shift unsupported by the language, the purpose or the structure of the Act, and contrary to the public interest benefits that can inhere in impact litigation specifically aimed at protecting consumers on a broad scale. In the context of the circumstances presented in this case, it is no stretch to say that the Lawyers simply could not make appropriate, efficient and ethical use of the Buyers' personal information under our pragmatic approach to the litigation exception without first engaging in solicitation, and they did so in a manner that was entirely in keeping with applicable state ethics norms. Put simply, they did what any good lawyer would have done; Congress could not possibly have intended to impose DPPA liability under such circumstances.

We therefore hold that as to DPPA provisions (b)(4) and (b)(12), conduct that might, prima facie, amount to prohibited solicitation (i.e., that prohibited absent express consent) leading to a disclosure of personal information, does not give rise to a cognizable claim under the DPPA when such use in solicitation is coextensive with, and inextricably intertwined with, conduct expressly permitted pursuant to the litigation exception. *Rine*, 590 F.3d at 1226. We determine next whether the district court erred in concluding that the litigation exception applies to the undisputed facts reflected in the record of this case.

D.

As stated above, the district court ruled that the litigation exception applied to the Lawyers' conduct because, as a matter of law, the undisputed facts demonstrated that they obtained and used the Buyers' personal information with the singular purpose of employing it in their investigation in anticipation of, and in connection with the prosecution of, the *Herron* litigation:

> The initial complaint and the amended complaint in the *Herron* litigation are evidence that the information obtained from the first two FOIA requests was useful in determining whether to file a group action. . . . The Plaintiffs have failed to come forward with any evidence to dispute the Defendants' evidence that the personal information from the first two FOIA requests was obtained in

> order to assist in identifying the highest volume dealers.

J.A. 1483-84. This conclusion is unassailable on the present record.

The Buyers argue that this determination was erroneous because the Lawyers "did not come forward with any evidence that they could introduce at trial in support of their position [that the exception applied to their conduct]. . . . None." Appellants' Br. 39. They assert that the district court relied solely on the Lawyers' "self-serving, unsworn assertions," and a handful of documents that were irrelevant to the legal question or, in the case of the *Herron* documents, were merely contextual. Appellants' Br. 38-9. The Lawyers counter that under the DPPA the Buyers have the burden to offer evidence of an impermissible purpose, yet in the face of the documented FOIA requests and the DMV's compliance – both of which were carried out under express invocation of the litigation exception – the Buyers only conclusorily describe the Lawyers' purpose and use as "solicitation." The Lawyers clearly have the better of the argument.

Under Fed. R. Civ. P. 56(c):

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits

> or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

We are satisfied that the district court did not err in concluding that the Buyers failed to generate a genuine dispute of material fact concerning the applicability of the litigation exception.

First, the Buyers' arguments throughout the proceedings below had been focused solely on the applicability of the litigation provision as a matter of law, i.e., that it did not protect the use here because the solicitation provision applied as well and imposed liability regardless of any other permitted use. They did not, however, produce or suggest any evidence that the provision did not apply as a factual matter.

The strongest substantive argument we might construe from the Buyers' position is that solicitation *cannot* occur "in anticipation of" or "in connection with" litigation, 18 U.S.C. § 2721(b)(4), and that if the Lawyers solicited they could not, by definition, have been acting in anticipation of, or in connection with, litigation. Plainly, we have rejected that contention above. In our view, such a position would improperly constrict the common meaning of "in anticipation of"

and "in connection with." The solicitation of clients by trial lawyers is surely connected to litigation in that representation for a legal claim is the goal. Here, where the Lawyers already had been contacted by potential clients, it cannot be said they were merely "trolling." Rather, the summary judgment record before us leaves no room to doubt that the Lawyers were looking to build and bolster a case against the dealerships if their initial information from consumers proved the existence of plausibly systemic violations of the Dealers Act.

Moreover, as to the Buyers' contention of procedural irregularity, the district court properly considered the complaints in *Herron* because the allegations made in that case corroborated the expressly stated intended and actual use of the letters in dispute. The Buyers failed to provide any evidence refuting the explicit language of the FOIA requests and letters, which solely support the claim that the Lawyers' conduct was either for use in "investigation in anticipation of litigation" or "in connection with" a civil proceeding. *Id.*

To be sure, the Buyers correctly note that the district court declined to take judicial notice of these documents for purposes of ruling on the motion to dismiss. At the time of that motion, the court explained:

> [T]he court declines to take judicial notice of the exhibits attached to the Defendants' motion in this case which largely consist of

> pleadings and transcripts in the *Herron* litigation. . . . The facts in the *Herron* litigation remain in dispute. Therefore, the court cannot take judicial notice of the contents of those documents.

J.A. 167. Thus, the district court took a cautious approach in its consideration of the Lawyers' Fed. R. Civ. P. 12(b)(6) motion to dismiss. Nevertheless, for purposes of the subsequent cross-motions for summary judgment, the *Herron* complaints and related documents were useful (and used) not to determine the factual basis of the Dealers Act claims, but as evidence only of the actual use of the Buyers' personal information obtained via the serial FOIA requests in connection with that litigation. The complaints evidenced the ends to which the information was requested and used, and therefore were relevant, material and admissible evidence of facts at issue – permissible purpose in the Lawyers' requesting that the DMV make the disclosure of, and permitted use of the personal information thereafter. We agree with the Eleventh Circuit that the Buyers bore the risk of non-persuasion on all elements of their claims, *Thomas*, 525 F.3d at 1114-15, and here the summary judgment record does not remotely show a genuine dispute of material fact.

We therefore hold that the district court properly took judicial notice of the *Herron* documents as probative evidence of the intended, and actual, use of the Buyers' DPPA-protected personal information. Furthermore, we agree that the Buyers failed to offer any

evidence generating an issue of material fact as to whether the use here was inextricably intertwined with investigation and prosecution of the *Herron* litigation. Thus, the district court did not err in its grant of summary judgment in favor of the Lawyers as to the applicability of the litigation exception.

III.

For the foregoing reasons, we hold that the district court erred in its determination that the conduct of the Appellees did not constitute solicitation within the contemplation of the applicable DPPA prohibition. Nevertheless, the court correctly ruled that the Appellees' conduct in respect to the Buyers' personal information was undertaken in anticipation of and in connection with litigation, a use clearly permitted by the DPPA. The propriety of that use having been established as a matter of law, and the antecedent solicitation being integral and necessary to, and inextricably intertwined with, the Lawyers' permitted use of the Appellants' personal information, the Appellants' claims fail as a matter of law. Accordingly, the judgment is

AFFIRMED.

APPENDIX B

FILED: April 4, 2012

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-2021
(7:09-cv-01651-HMH)

EDWARD F. MARACICH, individually and on behalf of all others similarly situated; MARTHA L. WEEKS, individually and on behalf of all others similarly situated; JOHN C. TANNER, individually and on behalf of all others similarly situated

Plaintiffs-Appellants

v.

MICHAEL EUGENE SPEARS; MICHAEL SPEARS, PA; GEDNEY MAIN HOWE, III; GEDNEY MAIN HOWE, III, PA; RICHARD A. HARPOOTLIAN; RICHARD A. HARPOOTLIAN, PA; A. CAMDEN LEWIS; LEWIS & BABCOCK, LLP

Defendants-Appellees

JUDGMENT

(Filed Apr. 4, 2012)

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Edward F. Maracich, Martha L. Weeks, and John C. Tanner, individually and on behalf of all others similarly situated, Plaintiffs, vs. Michael Eugene Spears, Michael Spears, P.A., Gedney M. Howe, III, Gedney M. Howe, III, P.A., Richard A. Harpootlian, Richard A. Harpootlian, P.A., A. Camden Lewis, and Lewis & Babcock, LLP, Defendants.	C.A. No. 7:09-1651-HMH **OPINION & ORDER** (Filed Aug. 4, 2010)

This matter is before the court on the Plaintiffs', Edward F. Maracich, Martha L. Weeks, and John C. Tanner, motion for partial summary judgment and the Defendants', Michael Eugene Spears, Michael Spears, P.A., Gedney M. Howe, III, Gedney M. Howe, III, P.A., Richard A. Harpootlian, Richard A. Harpootlian, P.A., A. Camden Lewis, and Lewis & Babcock, LLP, motion for summary judgment. For the reasons set forth below, the Defendants' motion for summary judgment is granted in part and the Plaintiffs' motion for partial summary judgment is denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

The relevant and material facts of this case are undisputed. The Plaintiffs in this putative class action allege that the Defendants violated the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. § 2721, by unlawfully obtaining personal information pursuant to the Freedom of Information Act ("FOIA") from the South Carolina Department of Motor Vehicles ("SCDMV") "for the impermissible purpose of soliciting clients." (Compl. ¶ 5.)

The Defendants represent plaintiffs in litigation currently pending in the South Carolina Court of Common Pleas, *Herron v. Dick Dyer & Associates, Inc., et al.*, Civil Action No. 2006-CP-02-1230, (hereinafter "*Herron* litigation").[1] The Defendants "filed *Herron* on behalf of South Carolina car buyers ("Car Buyers") charged illegal fees against all car dealerships ("Car Dealers") charging such fees, alleging violations of South Carolina law, including the Manufacturers, Distributors, and Dealers Act ("MDDA"), S.C. Code §§ 56-15-10, et seq." (Defs. Mem. Supp. Summ. J. 1.)

Defendant Richard A. Harpootlian ("Harpootlian") sent several FOIA requests to the SCDMV requesting

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[1] Two additional cases were filed on September 4 and September 20, 2007, respectively, *Adams v. Action Ford Mercury, Inc.* ("*Adams*"), Civil Action No. 2007-CP-02-1232 and *West-Cox v. Cale Yarborough Honda* ("*West-Cox*"), Civil Action No. 2007-CP-02-1154. Those cases have been stayed pending the outcome in *Herron* and consolidated with the *Herron* case.

information regarding individuals who purchased automobiles during specific periods of time requesting the names and addresses of car buyers. (Pls. Mem. Supp. Partial Summ. J. 2.) In total, Harpootlian sent six FOIA requests to the SCDMV from June 23, 2006 to January 23, 2007. (*Id.* 2-3.) The first two FOIA requests were sent prior to commencement of the *Herron* litigation. The remaining four FOIA requests were sent after the commencement of the *Herron* litigation to identify unnamed Car Buyers in order to respond to 183 motions to dismiss for lack of jurisdiction filed by the Car Dealers in *Herron* during the Fall and Winter of 2006. (Defs. Mem. Supp. Summ. J. 25.); (Pls. Mem. Supp. Partial Summ. J. 4.) Each FOIA request indicated that the request for disclosure of the personal information was permitted by the DPPA pursuant to 18 U.S.C. § 2721(b)(4). (Compl. Exs. A-F (FOIA Requests).) The SCDMV provided the requested information.

After obtaining the information from the SCDMV, beginning in January 2007, the Defendants sent letters to unnamed Car Buyers. The Defendants sent letters on January 4, 2007, January 23, 2007, March 1, 2007, March 5, 2007, and May 8, 2007, "to individuals whose Personal Information was obtained from the SCDMV pursuant to the FOIA letters sent by Defendant Harpootlian." (*Id.* ¶¶ 25-28.) The letters stated in pertinent part:

> We represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often

> referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee." We believe that these fees are being charged in violation of South Carolina law.
>
> We understand that you may have been charged one of these fees on your recent purchase of an automobile. . . .
>
> [W]e would like the opportunity [to] discuss your rights and options with you in a free consultation. If you are interested in participating in the case or in a free consultation, please mail the enclosed postage paid card.

(*Id.* Exs. G-K (Letters to Individuals).) In addition, the words **"ADVERTISING MATERIAL"** and statements required by South Carolina Rule of Professional Conduct 7.3(d)(1)-(3) & (g) were included in the letters. (*Id.* Exs. G-K (Letters to Individuals).) In compliance with Rule 7.3(c), copies of the letters and the mailing lists were filed with the Office of Disciplinary Counsel. (Pls. Mem. Supp. Partial Summ. J. 5 & Docket Entry 74 (Barbara Hinson Aff. ¶¶ 2-3).) The Defendants allege that "[t]hough these letters complied with Rule 7.3, such compliance was unnecessary since Rule 7.3 does not apply to communications with 'persons with whom the sender has a[n] existing professional relationship.'" (Defs. Mem. Supp. Summ. J. 6-7, quoting SCRPC 7.3(c) & (d)(1).)

The Plaintiffs assert that they received a letter from the Defendants and allege that their personal

information was obtained without their consent for the purpose of solicitation in violation of the DPPA. (Compl. ¶¶ 30, 31, 33.); (Pls. Mem. Supp. Partial Summ. J. Add'l Attach. (Declarations of the Plaintiffs, generally).)

The Plaintiffs filed the instant action against the Defendants on June 23, 2009. The Defendants filed a motion to dismiss on August 3, 2009, alleging in part that the Defendants obtained the personal information for a permissible purpose contained in 18 U.S.C. § 2721(b). The court denied the motion to dismiss on September 8, 2009. This matter was subsequently stayed on January 25, 2009. However, the court lifted the stay to allow the parties to file motions for summary judgment. On May 21, 2010, the Plaintiffs filed a motion for partial summary judgment. On May 24, 2010, the Defendants filed a motion for summary judgment. The parties have fully briefed the issues raised in the motions and this matter is now ripe for consideration.

II. Discussion of the Law

A. Summary Judgment Standard

Summary judgment is appropriate only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). Rule 56(c) mandates entry of summary judgment "against a party who fails to make a

showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v.* Catrett, 477 U.S. 317, 322 (1986).

In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in the nonmovant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248.

Moreover, "[w]hen a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

The Plaintiffs argue that the Defendants have not provided any competent evidence to support their motion for summary judgment. Specifically, the Plaintiffs allege that the "Defendants have not submitted any proper evidence in support of their motion, and the majority of the exhibits attached to Defendants' motion are unsworn, unauthenticated documents not properly before the Court." (Pls. Mem. Opp'n Defs. Summ. J. 5.) In assessing a summary judgment motion, a court is entitled to consider only

the evidence that would be admissible at trial. *Toll Bros., Inc. v. Dryvit Sys., Inc.*, 432 F.3d 564, 568 (4th Cir. 2005) ("Summary judgment is warranted when the admissible evidence forecasted by the parties demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.").

In general, the documents relied upon by the Defendants in their motion for summary judgment are documents attached to the Complaint, certified copies of public records including court transcripts and orders from the *Herron* litigation, and uncertified copies of public records from the *Herron* litigation. Pursuant to Rule 902(4) of the Federal Rules of Evidence, to be self-authenticated, the Defendants must provide certified copies of public records. The Plaintiffs do not challenge the authenticity of these records and have filed no motion to strike. *See Woods v. City of Chicago*, 234 F.3d 979, 989 (7th Cir. 2000) (finding that district court did not abuse discretion in considering an unauthenticated arrest report to which there was no dispute about its authenticity because "[r]equiring authenticating affidavits in this case would be an empty formality"). Moreover, the Plaintiffs rely on various court records in the *Herron* litigation in support of their motion for partial summary judgment. (Pls. Mem. Supp. Partial Summ. J. Add'l Attach. (Docket Entry 70).) Clearly, the documents attached to the complaint and the certified copies of court records are properly considered on a motion for summary judgment. Further, given that

there is no dispute regarding the authenticity of the uncertified public records and requiring certification would be "an empty formality," the court will consider the uncertified court records to the extent that the records contain competent evidence in deciding the parties' motions for summary judgment.[2] *Woods*, 234 F.3d at 989.

B. Defendants' Motion for Summary Judgment

The Defendants argue that:

> (1) Plaintiffs have failed as a matter of law to show that the Defendants obtained and used DMV information for a purpose not permitted by the DPPA; (2) the uncontroverted facts establish as a matter of law that Defendants obtained and used the DMV information for purposes permitted by the DPPA; (3) as a matter of law, Plaintiffs cannot establish a "knowing" violation of the DPPA; (4) Plaintiffs cannot prove any actual damages; and (5) application of the DPPA to Defendants' use of state DMV information in state court litigation is unconstitutional.

(Defs. Mem. Supp. Summ. J. 2-3.)

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[2] The court notes that the better practice is for litigants to provide authenticated copies of public records in support of a dispositive motion.

1. Permissible Use

Section 2721 permits a state department of motor vehicles ("DMV") to disclose protected personal information[3] for several permissible uses listed in § 2721(b). Section 2722 provides that "it is unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b)" and "to make false representation to obtain any personal information from an individual's motor vehicle record." Permissible uses are not affirmative defenses. The Plaintiffs have the burden of demonstrating that the "obtainment, disclosure, or use was not for a purpose enumerated under § 2721(b)." *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A.*, 525 F.3d 1107, 1111, 1114-15 (11th Cir. 2008) (affirming district court's grant of summary judgment to defendant law firm because it obtained the personal information for the permissible purpose of investigation in anticipation of litigation where "the automobile dealers he was litigating against were asserting that plaintiffs needed to plead and prove multiple acts of deceptive and unfair trade practices to state a deceptive and unfair trade

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[3] "'[P]ersonal information' means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. § 2725(3).

practice claim under Florida law" and "the information was used to send one-thousand 'Custom and Practice' letters, which aimed at obtaining evidence showing a custom and practice of deceptive acts engaged in by dealerships").

The court has considered all the evidence and for the reasons stated below finds that the Plaintiffs have failed to raise any genuine issue of material fact that the Defendants used, obtained, or disclosed personal information from the SCDMV without a permissible use in violation of the DPPA. For the reasons stated below, the court finds that the Defendants obtained the personal information for the permissible uses set forth in §§ 2721(b)(1) and (4).

a. Solicitation

The Plaintiffs allege that the Defendants obtained, used, and disclosed the personal information for the purpose of soliciting new clients for the *Herron* litigation. (Pls. Mem. Opp'n Mot. Summ. J. 1.) The Defendants argue that they did not obtain or disclose the information for the purpose of soliciting clients because an attorney-client relationship has existed with the named and unnamed Car Buyers since the inception of the *Herron* litigation because the MDDA is a consumer protection statute that allows the named Car Buyers to sue for the benefit of the whole in a group action. (Defs. Mem. Supp. Summ. J. 29-30.) Therefore, the Defendants submit that they could

not solicit a client with which they already had a client relationship.

Citing *Wemhoff v. District of Columbia*, 887 A.2d 1004 (D.C. Ct. App. 2005), the Plaintiffs argue that the letters mailed to individuals whose personal information was obtained from the FOIA requests contains marketing language which establishes that the Defendants obtained the personal information from the SCDMV for the purpose of solicitation. (Pls. Mem. Supp. Partial Summ. J. 14.); *Wemhoff*, 887 A.2d at 1012 (holding that "acquiring personal information from motor vehicle records for the purpose of finding and soliciting clients for a lawsuit is not a 'permissible use' within the meaning of § 2721(b)"). The letters included the language required by Rule 7.3 and were labeled **"ADVERTISING MATERIAL."** The first of these letters was not sent until five months after commencement of the *Herron* litigation. (Compl. Exs. G-K (Letters to unnamed Car Buyers).) The Defendants argue that the language was not required and was placed on the letters in an effort to be cautious. (Defs. Mem. Supp. Summ. J. 6-7, quoting SCRPC 7.3(c) & (d)(1).) Moreover, the Defendants informed opposing counsel in the *Herron* case that the language required by Rule 7.3 of the South Carolina Rules of Professional Conduct had been added as a cautionary measure and was not required. (*Id.*) Rule 7.3 does not apply to communications with "persons with whom the sender has a[n] . . . existing

professional relationship." S.C. Prof'l Conduct R. 7.3(c) & (d)(1). In a February 16, 2007 letter,[4] Defendant A. Camden Lewis in a letter to counsel for the Car Dealers in *Herron* stated:

> I am in receipt of your writing. . . . As you well recognized, the Freedom of Information Act requests were made under the exception of 18 U.S.C. § 2721(b)(4). They were for the purpose of gaining information in litigation and making sure the car buyers had been illegally charged as we set forth in our Complaint. It is a lawyer's duty to make sure injured citizens understand their rights, and when they have been secretly cheated to bring that to their attention if at all possible.
>
> You have mentioned that the material we sent out was designated "ADVERTISING MATERIAL." As you know that is a requirement of the Disciplinary Counsel, and, as we predicted, we knew that your group would try to see if we had met the requirements of the Disciplinary Counsel. In an abundance of caution we followed the requirements.

(Compl. Ex. M (Feb. 16, 2007 Letter).)

The trial court held in the *Herron* litigation, that the MDDA established a substantive right to proceed in a representative capacity for the "benefit of the

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[4] The letter is incorrectly dated. The Plaintiffs allege that the letter was sent in March 2007. (Pls. Mem. Supp. Partial Summ. J. 7.)

whole." The South Carolina Supreme Court stated in its order affirming the trial court's denial of the Car Dealers' motion to compel arbitration that

> [t]he purpose of the Dealers Act is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs from bringing individual actions. Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act:
>
> > When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.
> >
> > . . . .
> >
> > Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act. . . .

Herron v. Century BMW, 693 S.E.2d 394, 399 (S.C. 2010). The Defendants' representation of the Car Buyers in the *Herron* litigation is distinct, yet analogous to attorney representation in a class action under Rule 23 of the South Carolina Rules of Civil Procedure. "In a [Rule 23] class action, the [class]

attorney[ ] assume[s] fiduciary obligations or constructive attorney-client status with respect to the class." 3 Herbert Newberg & Alba Conte, Newberg on Class Actions § 15.16 (4th ed. 2002) (citing *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824 (3d Cir. 1973)). However, an attorney-client relationship in a Rule 23 class action generally "does not arise until the class is properly certified and notified." *Gillespie v. Scherr*, 987 S.W.2d 129, 131 (Tex. Ct. App. 1998) (holding that no attorney-client relationship exists pre-certification and notice); *Atari v. Sup. Ct.*, 166 Cal. App. 3d 867, 873 (Cal. Dist. Ct. App. 1985). The *Herron* litigation is a group action arising from a substantive right to proceed as a class without the procedural constraints of Rule 23. In the *Herron* litigation, class certification and opt in/out procedures do not apply. The trial court held in the *Herron* litigation as follows:

> Concerning the relationship between S.C.R.C.P. 23 and S.C. Code Ann. § 56-15-110(2), I find that Section 56-15-110(2) creates a substantive right. Because 1985 Act 100 (the Act enacting the Rules of Civil Procedure) is inapplicable to substantive rights, I find that the 1985 Act neither repealed S.C. Code Ann. § 56-15-110(2) nor required that a complaint asserting rights under § 56-15-110(2) include a requirement that the plaintiff plead and prove the class certification requirements of S.C.R.C.P. Rule 23.

(July 31, 2007 Order *Herron* litigation). The trial court further found in a subsequent order on a motion to dismiss a named plaintiff and substitute another

plaintiff that the Defendants, as counsel for the Car Buyers "from the inception of this litigation have represented the public interest in attempting to regulate allegedly unfair practices by motor vehicle dealers and therefore represent all those affected by such practices." (Defs. Mem. Supp. Mot. Summ. J. Ex. S (March 10, 2008 Order Denying Mot. to Dismiss and Substitute at 6).) From its inception, the Defendants' represented the named Car Buyers in the *Herron* litigation "for the benefit of the whole." Likewise, the Defendants have represented all unnamed Car Buyers.

In addition, even if an attorney-client relationship does not exist between the Defendants and the unnamed Car Buyers, at a minimum, since the inception of the *Herron* litigation, the Defendants have owed all unnamed Car Buyers a fiduciary duty. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) ("[C]lass attorneys . . . owe the entire class a fiduciary duty once the class complaint is filed."); *Greenfield*, 483 F.2d at 832 ("[C]lass action counsel possess, in a very real sense, fiduciary obligations to those not before the court"). "Solicitation of parties [to help maintain the action on behalf of a class] may be entirely appropriate, if not required, as part of class counsel's fiduciary duty." *In re Avon Sec. Litig.*, No. 91 CIV. 2287(LMM), 1998 WL 834366, at *10 (S.D.N.Y. Nov. 30, 1998) (unpublished). Based on the foregoing, the Defendants did not solicit the unnamed Car Buyers as a matter of law. Thus, the Plaintiffs have failed to

raise a genuine issue of material fact that the Defendants obtained or used the personal information for the impermissible purpose of solicitation.

b. Application of DPPA Permissible Use Exceptions

Further, even if the Defendants also obtained, used, or disclosed the personal information for the purpose of solicitation, the Defendants did not violate the DPPA as long as the Defendants had a permissible purpose for obtaining, using, and disclosing the personal information. In *Thomas*, the plaintiff argued that the defendant law firm had a "second ulterior motive for obtaining the vehicle records; i.e., they were obtained for the purpose of creating a database of witnesses for prospective, not-yet-filed litigation – as opposed to currently pending cases." 525 F.3d at 1115 n.5. The Eleventh Circuit found that the argument was without merit noting that "[t]he litigation clause refers to investigation *in* anticipation of litigation. Thus, even if the accumulation of potential witnesses related, in part, to certain cases not yet filed, we do not see how pre-suit investigation can be considered per se inapplicable to the litigation clause." *Id.*

In addition, in *Rine v. Imagitas, Inc.*, 590 F.3d 1215, 1219 (11th Cir. 2009), the plaintiffs received their state of Florida registration renewal information in the mail with enclosed advertisements and solicitations, which were prepared and developed by

the defendant marketing company. The plaintiffs argued that the defendant had violated the DPPA for failing to comply with the bulk solicitation exception set forth in § 2721(b)(12). *Id.* at 1221. The defendant argued that its actions did not violate the DPPA, because the disclosure of personal information was permitted under § 2721(1) "[f]or use by . . . any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." *Id.* at 1223. The Eleventh Circuit found that "nothing in the DPPA suggests that the (b)(12) exception alters the scope or meaning of the separate and independent exception found in subsection (b)(1). As such, the statutory exceptions found in section 2721(b) are not mutually exclusive, meaning that any one or more of them may be applicable to a given situation." *Id.* at 1226. Further, the court noted that *Rine* "involve[d] two statutory provisions that potentially apply. While these provisions may overlap, they both apply to situations not governed by the other and both must be given effect unless they pose an either-or proposition." *Id.* (internal quotation marks omitted). Thus, the Eleventh Circuit concluded that the defendant was not required to comply with § 2721(b)(12).

The court declines to follow the Third Circuit's holding in *Pichler v. UNITE*, 542 F.3d 380, 395 (3d Cir. 2008). The Third Circuit held that "[t]he [DPPA] contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permissible purpose." *Id.* Therefore, the Third Circuit found that "[b]ecause UNITE obtained

and used the confidential information for an impermissible purpose – union organizing – it does not matter what other permissible purpose UNITE may have had." *Id.* In contrast, the dissent in *Pichler* concluded, and this court agrees that "the Eleventh Circuit's interpretation of § 2721(b)(4)" in *Thomas* is correct. *Id.* at 402 (Sloviter, J., dissenting).

> The provision is written broadly. It allows the use of personal information from motor vehicle records "in connection with" a wide range of litigation activities, including "the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders. . . ." 18 U.S.C. § 2721(b)(4). UNITE produced evidence that because it was aware of litigation against Cintas, it sought and obtained evidence of related legal violations during its home visits, and that it used that information to bring a considerable number of allegations before state, federal, and administrative adjudicatory bodies. . . . In light of this evidence, there can be little doubt that at least one of UNITE's purposes for using the restricted information was in connection with investigation in anticipation of litigation.

Id. (internal citation omitted).

The Plaintiffs argue that because the Defendants obtained the personal information for the purpose of solicitation, they were required to comply with § 2721(b)(12), which requires that drivers consent to

bulk solicitation. (Pls. Mem. Supp. Partial Summ. J. 16.) However, as set forth above, if any § 2721(b) exception applies, the Defendants had a permissible purpose for the information and were not required to comply with § 2721(b)(12). The *Wemhoff* case is not inconsistent with this finding. In *Wemhoff*, the plaintiff sought

> [a]ll records – with redactions as necessary . . . to protect personal identity – of all motorists who were "caught" by your photo/red light camera stationed on the H Street Bridge [in the Northeast quadrant of the District of Columbia] approaching the corner of North Capitol Street. This would include addresses of those issued automatic citations.

887 A.2d at 1006. The plaintiff sought the records "so that he c[ould] solicit these individuals to bring a class action lawsuit against the District of Columbia for negligence and 'selective enforcement' of the law." *Id.* at 1006 n.2. Specifically, the plaintiff sought the personal information "to solicit persons for his lawsuit who may have received and paid photo/red light camera citations relating to the North Capitol and H Streets location." *Id.* at 1009. The defendant refused to produce the requested information pursuant to the plaintiff's FOIA request. *Id.* at 1006. The plaintiff argued that the DPPA allowed for disclosure of the information under § 2721(b)(4) for "investigation in anticipation of litigation." *Id.* at 1010. The court held that the plaintiff was not investigating in

anticipation but solely seeking to solicit clients for a yet to be filed class action lawsuit. 887 A.2d at 1011-12. Most importantly, the court noted that no § 2721(b) exception applied. *Id.* (considering other exceptions under § 2721(b) and finding them inapplicable because "Mr. Wemhoff is not an agent of the government; nor does he desire the personal information in the motor vehicle records for any of the purposes listed above"). Therefore, the *Wemhoff* court concluded that the plaintiff was not entitled to the information under the DPPA. *Id.* at 1012. Consistent with the foregoing, the court finds that as long as the Defendants had a permissible purpose for obtaining, using, and disclosing the information, there is no DPPA violation. As such, irrespective of whether the Defendants' actions constitute solicitation, the real issue is whether the Defendants had a permissible purpose for obtaining, using, and disclosing the personal information.

c. Litigation Exception

The Defendants allege that there is no violation of the DPPA as a matter of law because they obtained and used the personal information for the permissible use identified in § 2721(b)(4), which provides that a state DMV may disclose personal information

> [f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in

> anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

18 U.S.C. § 2721(b)(4). The Defendants allege that "the uncontrovertable facts clearly establish that the DMV information was obtained and used to determine whether *Herron* could be filed 'for the benefit of the whole' as a group representative action and to establish in *Herron* the standing of the unnamed Car Buyers whom Defendants represented." (Def. Mem. Supp. Summ. J. 16.)

i. Investigation in Anticipation of Litigation

The Defendants argue that they obtained personal information pursuant to the first two FOIA requests submitted prior to the filing of the *Herron* litigation for the permissible purpose of investigation in anticipation of litigation. The Defendants submit that the first two FOIA requests were sent with the purpose of investigating whether the charging of the allegedly unauthorized fees to car buyers was a common practice in order to determine whether the *Herron* case could be filed as a group action for the benefit of the whole. (*Id.* at 23-24.)

One court has found that in order to determine whether the information was obtained for the permissible purpose of anticipation of litigation

> there must be an actual investigation, litigation must appear likely at the time of the investigation, and the protected information acquired during the investigation must be of "use" in the litigation, meaning that there was "a reasonable likelihood that the decision maker would find the information useful in the course of the proceeding."

Pichler v. Unite, 446 F. Supp. 2d 353, 368 (E.D. Pa. 2006). In the case at bar, there was an actual investigation. The Defendants had been approached in June 2006 by individuals regarding the charging of these fees, which the Defendants believed were illegal fees. (Defs. Mem. Supp. Summ. J. 11.) The Plaintiffs do not dispute that the eight named individuals in the *Herron* case independently approached the Defendants with their claims. The Defendants believed that these fees were commonly charged and as evidenced by the language of the first two FOIA requests sought to determine the extent to which the practice was widespread. The first FOIA request stated:

> This is a Freedom of Information request in anticipation of litigation . . . pursuant to the exception in 18 U.S.C. § 2721(b)(4) of the Driver's Privacy Protection Act of 1994 (copy enclosed). I have plaintiffs who have complained of certain conduct as a result of their transactions with car dealers, conduct which I believe to be a potential violation of state law. I am attempting to determine if this is a common practice, and am accordingly submitting this FOIA request.

(Compl. Ex. A (First FOIA request).) The second request dated August 24, 2006, states that it is being submitted in "anticipation of litigation" and requests the same information as the first FOIA request, but for a broader geographic region. (*Id.* Ex. B (Second FOIA request).) In *Bailey v. Daniels*, 679 F. Supp. 2d 713, 714 (W.D. La. 2009), the defendant used the plaintiff's license plate to acquire DMV information to identify him because the defendant believed the plaintiff had committed a crime against him. In granting summary judgment to the defendant, the court held that the § 2721(b)(4) anticipation of litigation exception applied. The court found as follows:

> Mr. Daniels genuinely believed that a crime had been committed against him; as it turns out, he was correct. . . . Under these circumstances, we cannot say that the information *was not* acquired for the purpose of prospective litigation, be it criminal or civil, as contemplated by the litigation exception to the DPPA. Thus, the defendant's reliance upon the exception is highly plausible. More importantly, the plaintiff has not raised a genuine issue of material fact regarding Mr. Daniels' permissible purpose for obtaining the information. . . . [*A*]*t the time Mr. Daniels . . . acquired the information*, he did so for the permissible purpose of investigating a possible crime against himself in anticipation of future litigation. In sum, with the extremely odd facts of this case, Mr. Bailey has failed to present a genuine issue of material fact regarding whether Mr. Daniels obtained

> the personal information for a use not permitted by the statute. Such proof is a required element in order to maintain an improper obtainment claim under the DPPA.

Id. at 721-22 (internal citation omitted).

The Plaintiffs argue that the first two FOIA requests were not submitted for the purpose of investigation in anticipation of litigation because the requests "did not seek information about whether car buyers were charged administrative fees or how much those fees were." (Pls. Mem. Opp'n Summ. J. 16.) Further, the Plaintiffs allege that the Defendants did not use the information to contact any Car Buyers until the letters to unnamed Car Buyers were sent after the commencement of the *Herron* litigation. (*Id.*) Finally, the Plaintiffs allege that the second FOIA request was sent only three business days before the *Herron* litigation was filed. (*Id.*)

The Defendants submit that their "initial investigation revealed that the Automobile Dealers Association may have ratified the charging of illegal fees. In an attempt to verify whether the wrongful conduct was part of a common practice such that suit could be brought 'for the benefit of the whole,' Defendants undertook to identify the highest volume dealers." (Defs. Mem. Supp. Summ. J. 11.) The Defendants state that "[t]his investigation revealed the dealerships with the highest volume of transactions charging deceptive fees." (*Id.*) In the case at bar, the *Herron* litigation was commenced and the information

obtained from the first two FOIA requests was useful in determining whether to file a group action. The Plaintiffs are essentially arguing that the Defendants were required to undertake additional investigation in order to constitute investigation in anticipation of litigation. This argument is without merit.

The initial complaint and the amended complaint in the *Herron* litigation are evidence that the information obtained from the first two FOIA requests was useful in determining whether to file a group action. The Defendants filed the *Herron* litigation on August 29, 2006, "on behalf of four named Car Buyers and, because investigation disclosed that deceptive practices were widespread, for the benefit of all car buyers who paid administrative fees against 51 Car Dealers." (*Id.* Ex. A (*Herron* First Compl.) (internal quotations omitted).) Further, on October 31, 2006, Defendants filed an amended complaint in the *Herron* litigation to add four Car Buyers and over 250 Car Dealers and to add claims for civil conspiracy and declaratory judgment. (*Id.* Ex. C (*Herron* Am. Compl).)

The Plaintiffs have failed to come forward with any evidence to dispute the Defendants' evidence that the personal information from the first two FOIA requests was obtained in order to assist in identifying the highest volume dealers. Based on the foregoing, the Plaintiffs have failed to raise a genuine issue of material fact regarding the Defendants' permissible purpose for obtaining the personal information in the first two FOIA requests. With respect to the personal

information obtained from the first two FOIA requests, the court finds the Defendants did not violate the DPPA as they acquired the information for the permissible purpose of investigation in anticipation of litigation.

ii. Use in Connection with Pending Litigation

With respect to the four FOIA requests submitted after the commencement of the *Herron* litigation, the Defendants allege that they sent the four FOIA requests for the permissible use set forth in § 2721(b)(4), "[f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court." (Defs. Mem. Supp. Summ. J. 20.) The court agrees.

It is undisputed that the Defendants sent the four FOIA requests after the initiation of the *Herron* case to identify a car buyer for each named car dealer because the Car Dealers had moved to dismiss for lack of standing all Car Dealers for which there was no named car buyer that had transacted business with a named Car Buyer. (Defs. Mem. Supp. Summ. J. 25 & Ex. B (Car Dealers' Mot. Dismiss).) The litigation exception is extremely broad and contains a few examples, but does not expressly restrict the types of permissible uses that are uses in connection with ongoing litigation. As discussed above, identifying a representative car buyer for each car dealer for purposes of responding to the Car Dealers' motions to

dismiss also meant the Defendants generated new clients. That is insufficient under the facts of this case to find a violation under the DPPA.[5]

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[5] In addition, to find otherwise would be contrary to the intent of Congress in enacting the DPPA. The DPPA was enacted as "part of crime fighting legislation enacted in response to the murder of a young woman in Los Angeles, California in 1989" by a stalker who obtained her address from DMV records. *Margan v. Niles*, 250 F. Supp. 2d 63, 68-69 (N.D.N.Y. 2003) (citing 139 Cong. Rec. S15745-01, S15761-66 (1993); 145 Cong. Rec. S14533-02, S14538 (1999)). After her murder, "several members of Congress sought to prevent state motor vehicle departments from freely providing personal information obtained from motor vehicle records." *Id.* at 68 (citing 145 Cong. Rec. S14533-02, S14538). With the DPPA, "Congress intended to prevent stalkers, harassers, would-be criminals, and other unauthorized individuals from obtaining and using personal information from motor vehicle records." *Id.* at 68-69 (citing 145 Cong. Rec. S14533-02, S14538 ("[T]he murder of Rebecca Schaeffer led to the [DPPA]."); 141 Cong. Rec. H416-06, H447 (1995) (Rep. Dingell stated that "[l]ast year, as part of the crime bill, Congress heard the concerns of women who were being stalked because of easy access to motor vehicle records that reveal . . . addresses. To address this problem, Congress enacted the [DPPA]."); 140 Cong. Rec. H2518-01, H2527 (1994) (Rep. Goss stated: "[T]he intent of this bill is simple and straightforward: We want to stop stalkers from obtaining the name and address of their prey before another tragedy occurs. . . . [T]he [DPPA] . . . is a reasonable and practical crime fighting measure."); 139 Cong. Rec. S15745-01, S15764-66 (1993) (Sens. Robb, Biden and Harkin stating that "[t]his amendment closes a loophole in the law that permits stalkers to obtain – on demand – private, personal information about their potential victims" and further discussing other incidents where an anti-abortion activist obtained the name and address of a patient from DMV records and sent her threatening letters; an obsessed fan assaulted a model at her home after obtaining the address from

(Continued on following page)

When the Defendants submitted the four FOIA requests, the Defendants represented eight named Car Buyers who had approached the Defendants independently in June 2006 with their claims. (Defs. Mem. Supp. Summ. J. 11 & Ex. C (*Herron* Am. Compl, generally).) Thus, when the Defendants sent the post-litigation FOIA requests, the Defendants had a pending group action against the Car Dealers, which distinguishes this case from *Wemhoff*, 887 A.2d at 1011-12, and *Pichler v. UNITE*, 585 F.3d 741, 751 (3d Cir. 2009), in which the attorneys were seeking the information in order to find clients to enable them to file a class action lawsuit. The Defendants were not "trolling" for clients in the *Herron* litigation in an effort to bring a lawsuit. *Pichler*, 585 F.3d at 753. Instead, the Defendants' actions were necessary to respond to the Car Dealers' motions to dismiss for lack of standing to prevent the unnamed Car Buyers from potentially losing their claims against the Car Dealers. The letters sent to unnamed Car Buyers clearly stated that the Defendants "represent a group of consumers in a pending lawsuit" against Car Dealers charging a fee "in violation of South Carolina law." (Compl. Exs. G-K (Letters to unnamed Car Buyers).) The FOIA requests cite § 2721(b)(4), the litigation exception, and the letters to unnamed Car

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the DMV; and teens identified cars with expensive stereos and utilized the license plate numbers to find the owners' home addresses)).

Buyers indicated that the information was being used in connection with the *Herron* litigation.

The Plaintiffs cite the affidavit of Plaintiff John Tanner ("Tanner") as raising a genuine issue of material fact that the Defendants obtained and used the personal information for the purpose of solicitation. Tanner's affidavit fails to raise a genuine issue of material fact that the Defendants acted without a permissible purpose. Tanner opines that he spoke with Defendant Dick Harpootlian via telephone after receiving a letter. Tanner states that "Mr. Harpootlian did not express any interest in finding out any facts about my interaction with the dealership who sold me my car. Instead he made an aggressive sales pitch to me in which he tried to get me to sign up as a client for a lawsuit against the dealership from which I had purchased my car." (Pls. Mem. Opp'n Defs. Summ. J. Supplemental Decl. ¶ 6).) Tanner's affidavit is consistent with the Defendants' stated reasons for permissibly using the personal information obtained from the FOIA requests: to identify a Car Buyer for every Car Dealer in order to respond to the pending motions to dismiss. Based on Tanner's affidavit, Defendant Harpootlian informed Tanner that he had a claim against the dealership where he had purchased the car, informed him of the existence of the lawsuit, and asked whether he would be interested in participating in the lawsuit. (*Id.* Supplemental Decl., generally.) As previously discussed, even if the Defendants' actions constituted solicitation, as long as the Defendants had a

permissible use for the information, there is no DPPA violation.

It is undisputed that the Defendants sent the letters to individuals who they believed were charged allegedly illegal fees by the Car Dealers in an effort to identify a car buyer for each car dealer to respond to the Car Dealers' motions to dismiss.[6] (Pls. Mem. Supp. Partial Summ. J. 9 (stating that after the mailing of the letters to unnamed Car Buyers, "hundreds" came forward wanting to participate in the *Herron* litigation and "[t]he Defendants filed a Motion to Amend the Herron complaint to add 246 new named plaintiffs to defeat the defendant car dealers' standing arguments").) On June 5, 2007, the Car Buyers filed a motion to amend to add 246 new plaintiffs to moot the Car Dealers' motions to dismiss. (Defs. Mem. Supp . Summ. J. Ex. H (Motion to Amend Complaint).) However, the trial court denied the motion to amend on August 21, 2007. (Pls. Mem. Supp. Partial Summ. J. Ex. N (Order August 21, 2007).) In response, the Defendants filed the *West Cox* and *Adams* actions. (Ans. ¶ 68.) The Defendants state in their answer to the complaint that

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[6] Notably, the Car Dealers, not the Car Buyers, argued that there had to be an injured Car Buyer for each named Car Dealer in order to avoid dismissal. (Defs. Mem. Supp. Summ. J. 25 & Ex. B (Car Dealers' Mot. Dismiss).) The Defendants argued in the *Herron* litigation that a Car Buyer for each Car Dealer was not required. (*Id.* Ex. F (Car Buyers Mem. Opp'n Mot. Dismiss).)

> [t]he Car Dealers [in *Herron*] resolutely continued to challenge standing, filing a joint motion for reconsideration under Rule 59(e), SCRCP of the Courts July 31, 2007 Order. If Judge Early were to change his mind about standing – or if his decision were reversed on appeal – the unnamed Car Buyers would lose their claims. In light of this predicament and in accordance with their judicially confirmed obligations to the entire group of Car Buyers, Defendant Attorneys filed the *Adams* and *West-Cox* cases based on the same Dealers Act violations asserted in Herron in order to maintain the viability of the claims of hundreds of previously unnamed Car Buyers. Those cases were filed on September 4 and September 20, 2007, respectively, and consolidated before Judge Early. Defendant Attorneys then dismissed all Car Dealers in *Herron* that did not have a corresponding named Car Buyer. Thus, without conceding the issue of standing, Defendant Attorneys mooted the issue by insuring that in all three pending suits each defendant Car Dealer had a corresponding named Car Buyer.

(*Id.*) Subsequently, on January 31, 2008, the trial court granted the Car Dealers' motion for reconsideration on the standing issue in part finding as follows:

> I conclude that a named Plaintiff has standing to pursue all three causes of action, on behalf of himself or others, against the Defendant from which that particular Plaintiff purchased a vehicle. However, a named Plaintiff does not have standing to sue, on

> behalf of himself or others, any Defendant with which he did not transact any business. A named Plaintiff may later gain standing to sue Defendants with which a named Plaintiff did not transact any business by presenting evidence sufficient to create a genuine issue of material fact that particular Defendant conspired on the charging of the closing fee with the Defendant from which the named Plaintiff purchased a vehicle.

(Pls. Mem. Supp. Partial Summ. J. Ex. O (Jan. 31, 2008 Order).) Under the facts of this case, obtaining and using the personal information in order to respond to potentially dispositive motions in a pending case falls squarely within the litigation exception in § 2721(b)(4) even if the Defendants had the secondary motive of soliciting clients. There is no question that the Defendants utilized the information they obtained for use in the *Herron* litigation in order to respond to the Car Dealers' motions to dismiss and to protect the viability of the unnamed Car Buyers' claims against Car Dealers that had moved to dismiss for lack of standing.

Based on the foregoing, the court finds that there are no genuine issues of material fact that the Defendants obtained and used the personal information obtained from the four FOIA requests for a permissible purpose, the litigation exception in § 2721(b)(4). Further, to the extent the Defendants used the personal information obtained from the first two FOIA requests for the purpose of responding to the Car Dealers' motions to dismiss, this conduct also falls

within the litigation exception for the same reasons discussed above. Based on the foregoing, the Defendants are entitled to summary judgment.

iii. State Action Exception

In addition, the Defendants allege that the personal information obtained from the SCDMV did not violate the DPPA because it allows the disclosure of protected information "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." § 2721(b)(1); (Defs. Mem. Supp. Summ. J. 26.) Therefore, in deciding whether the § 2721(b)(1) exception applies, the court must determine whether the Defendants were carrying out a function of the state and were acting on behalf of the state. *Rine*, 590 F.3d at 1223.

The MDDA authorizes the Attorney General's office in S.C. Code § 56-15-40(5) to "investigate, issue cease and desist orders and injunctive relief on any valid abuse connected with the sale, rental or leasing of a new or used motor vehicle." Further, in § 56-15-110(2), the MDDA authorizes a private person or entity "[w]hen such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including **actions for injunctive**

relief." (Emphasis added.) Therefore, the MDDA authorizes a private person to act on behalf of a state in carrying out its function of obtaining injunctive relief for violations of the MDDA. The trial court in *Herron* concluded that the Defendants were acting as "private attorneys general" finding as follows:

> [T]his case is being prosecuted pursuant to a "private attorneys general" provision under the Dealers Act. A "private attorneys general suit" is a term used by courts when statutes authorize both the Attorney General's office and private citizens, through civil actions, to enforce regulations. In this case, the Dealers Act empowers both the state Attorney General and private citizens to seek injunctive relief on behalf of the public. Plaintiffs have sought injunctive relief on behalf of the whole and thus are acting as private attorneys general. Plaintiffs' counsel, as private attorneys general, from the inception of this litigation have represented the public interest in attempting to regulate allegedly unfair practices by motor vehicle dealers and therefore represent all those affected by such practices.

(Defs. Mem. Supp. Summ. J. Ex. A (Order at 6 (citations omitted)).) The court agrees. The *Herron* litigation is a group action for the "benefit of the whole" and the Car Buyers are seeking, in part, injunctive relief for the Car Buyers. (*Id.* Ex. C (*Herron* Am. Compl., generally).) Further, although the FOIA requests sent to the SCDMV requesting the personal

information identifies the litigation exception in § 2721(b)(4), not the state action exception, the Defendants also had the permissible use set forth in § 2721(b)(1). As discussed earlier, "the statutory exceptions found in section 2721(b) are not mutually exclusive, meaning that any one or more of them may be applicable to a given situation." *Rine*, 590 F.3d at 1216. Based on the foregoing, the Defendants' motion for summary judgment on this ground is granted.[7]

C. The Plaintiffs' Motion for Partial Summary Judgment

The Plaintiffs move for partial summary judgment requesting that the court enter judgment as a matter of law finding

> (1) that the Defendants violated the DPPA when they obtained Plaintiffs' Personal Information for the purpose of solicitation; (2) that the Defendants violated the DPPA when

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[7] The Defendants raise additional grounds for summary judgment. However, having found that the Defendants had a permissible use for obtaining, using, and disclosing the personal information, the court declines to address those grounds further and denies the remaining grounds for relief ("as a matter of law, Plaintiffs cannot establish a 'knowing' violation of the DPPA; . . . Plaintiffs cannot prove any actual damages; and application of the DPPA to Defendants' use of state DMV information in state court litigation is unconstitutional") for the reasons stated in this court's September 8, 2009 Order on the Defendants' motion to dismiss. However, the court notes that even assuming that the Defendants' actions violate the DPPA, there is no evidence that the Defendants knowingly violated the DPPA.

> they used Plaintiffs' Personal Information to solicit clients; and (3) that the Defendants violated the DPPA when they disclosed Plaintiffs' Personal Information in furtherance of their efforts to solicit clients.

As set forth above, no genuine issues of material fact exist concerning whether the Defendants obtained and used the personal information for the purpose of solicitation in violation of the DPPA. The undisputed facts reveal that the Defendants obtained and used the personal information for the permitted purposes set forth in §§ 2721(b)(1) and (4).

With respect to the Plaintiffs' argument that the Defendants disclosed the personal information in violation of the DPPA "in furtherance of their efforts to solicit clients" when they provided the Office of Disciplinary Counsel "copies of the letters they sent to the Plaintiffs and putative class members, along with lists of the names and addresses of the individuals to whom the letters were sent," this claim also fails. (Pls. Mem. Supp. Partial Summ. J. 34 & Add'l Attach. (Hinson Aff. ¶¶ 2-3).)

As discussed fully above, even if the Defendants' conduct also constitutes solicitation, the Defendants disclosed the information to the Office of Disciplinary Counsel for the permissible purpose of use in connection with pending litigation. If the Defendants were soliciting clients, they were required to comply with Rule 7.3 and therefore, file the required information with the Office of Disciplinary Counsel. This conduct does not violate the DPPA because the Defendants

disclosed the information to permit them to send the letters in an effort to respond to the Car Dealers' motions to dismiss, which the court has found was a permissible use under the litigation exception in § 2721(b)(4). It would be unreasonable for the Plaintiffs to argue that the Defendants should have subjected themselves to a potential violation of the South Carolina Rules of Professional Conduct by not filing the information with the Office of Disciplinary Counsel.

Further, the disclosure of personal information to the Office of Disciplinary Counsel was permitted under § 2721(b)(1), the state action exception, as the Defendants were disclosing the information to a state agency. Based on the foregoing, having found that the Defendants had a permitted use for the personal information obtained, used, and disclosed as a matter of law, the Plaintiffs' motion for partial summary judgment is denied.

Therefore, it is

ORDERED that the Defendants' motion for summary judgment, docket number 77, is granted in part. It is further

ORDERED that the Plaintiffs' motion for partial summary judgment, docket number 68, is denied.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States
District Judge

Greenville, South Carolina
August 4, 2010

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Edward F. Maracich, Martha L. Weeks, and John C. Tanner, individually and on behalf of all others similarly situated,

vs.

Michael Eugene Spears, Michael Spears, P.A., Gedney M. Howe, III, Gedney M. Howe, III, P.A., Richard A. Harpootlian, Richard A. Harpootlian, P.A., A. Camden Lewis, and Lewis & Babcock, LLP,

SUMMARY JUDGMENT IN A CIVIL CASE

Case Number: 7:09cv1651-HMH

[X] **Decision by Court.** This action came before the Court for consideration. The issues have been considered and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that Defendants' motion for summary judgment is granted as set out.

LARRY W. PROPES, Clerk
By: /s/ [Illegible]
Deputy Clerk

August 4, 2010

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Edward F. Maracich, Martha L. Weeks, and John C. Tanner, individually and on behalf of all others similarly situated, Plaintiffs, vs. Michael Eugene Spears, Michael Spears, P.A., Gedney M. Howe, III, Gedney M. Howe, III, P.A., Richard A. Harpootlian, Richard A. Harpootlian, P.A., A. Camden Lewis, and Lewis & Babcock, LLP, Defendants.	C.A. No. 7:09-1651-HMH **OPINION & ORDER** (Filed Aug. 8, 2009)

This matter is before the court on Defendants' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons set forth below, the Defendants' motion is denied.

I. Factual and Procedural Background

The Plaintiffs in this putative class action allege that the Defendants violated the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. § 2721, by unlawfully obtaining personal information pursuant to the Freedom of Information Act ("FOIA") from the South Carolina Department of Motor Vehicles ("SCDMV")

"for the impermissible purpose of soliciting clients." (Compl. ¶ 5.)

According to the complaint, Defendant Richard A. Harpootlian ("Harpootlian") sent several FOIA requests to the SCDMV requesting information regarding individuals who purchased automobiles during specific periods of time "including the name, address, and telephone number of the buyer, dealership where the vehicle was purchased, type of vehicle purchased, and the date of purchase." (*Id.* ¶ 19.) In total, Harpootlian sent six FOIA requests to the SCDMV from June 23, 2006 to January 23, 2007. Each FOIA request indicated that the request for personal information was permitted by the DPPA set forth in 18 U.S.C. § 2721(b)(4). The SCDMV provided the requested information.

In a January 4, 2007 letter, mailed to "individuals whose Personal Information was obtained from the SCDMV pursuant to the FOIA letters sent by Defendant Harpootlian," the Defendants "solicited clients for a lawsuit against certain dealerships, and offered a free consultation to all recipients." (*Id.* ¶ 24.) In addition, the Defendants sent additional letters on January 23, 2007, March 1, 2007, March 5, 2007, and May 8, 2007 "to individuals whose Personal Information was obtained from the SCDMV pursuant to the FOIA letters sent by Defendant Harpootlian." (*Id.* ¶¶ 25-28.) The Plaintiffs submit that in these letters the Defendants "solicited clients for a lawsuit against certain dealerships, and offered a free consultation to

all recipients." (*Id.*) The letters stated in pertinent part:

> We represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee." We believe that these fees are being charged in violation of South Carolina law.
>
> We understand that you may have been charged one of these fees on your recent purchase of an automobile. . . .
>
> [W]e would like the opportunity [to] discuss your rights and options with you in a free consultation. If you are interested in participating in the case or in a free consultation, please mail the enclosed postage paid card.

(Compl., Exs. G-K.) In addition, the words **"ADVERTISING MATERIAL"** and statements required by South Carolina Rule of Professional Conduct 7.3(d)(1)-(3) & (g) were included in the letters. (*Id.*) In compliance with Rule 7.3.23, copies of the letters and the mailing lists were filed with the Office of Disciplinary Counsel. (*Id.*) The Defendants allege that "[t]hough the Defendant Attorneys complied with Rule 7.3, no such compliance was necessary. Rule 7.3 does not apply to communications with 'persons with whom the sender has a[n] existing professional relationship.'" (Defs. Mem. Supp. Mot. Dismiss 19,

quoting SCRPC 7.3(c) & (d)(1).) The Plaintiffs assert that they received a letter from the Defendants and allege that their personal information and the personal information of "other motor vehicle owners within the Class" was obtained without their consent for the purpose of solicitation in violation of the DPPA. (Compl. ¶¶ 30, 31, 33.) The Defendants allege that the information was obtained in connection with pending litigation in state court, *Herron v. Dick Dyer & Associates, Inc., et al.*, Civil Action No. 2006-CP-02-1230, ("*Herron* litigation"), in which the Defendants "represent a group of aggrieved car buyers . . . who have claims against car dealers . . . for charging unfair and deceptive closing fees in violation of South Carolina laws." (Defs. Mem. Supp. Mot. Dismiss 10.)

The Plaintiffs filed the instant action against the Defendants on June 23, 2009. The Defendants filed the instant motion to dismiss on August 3, 2009, alleging that the Defendants obtained the personal information for a permissible purpose contained in 18 U.S.C. § 2721(b). The Plaintiffs filed a response in opposition on August 21, 2009, and the Defendants replied on August 31, 2009.

II. Discussion of the Law

A. Federal Rule of Civil Procedure Rule 12(b)(6)

In federal court, a claimant must make only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (U.S. 2009) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

> The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id. (citation omitted). In addition, the court must accept as true factual allegations in the complaint. However, this tenet is "inapplicable to legal conclusions." *Id.* When deciding a Rule 12(b)(6) motion to dismiss, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine . . . , in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). "Only indisputable facts are susceptible to judicial notice." *Nolte v. Capital One Financial Corp.*, 390 F.3d 311, 317 n.1 (4th Cir. 2004) (finding that "[a]lthough the filing of an SEC complaint against Willey is indisputable, the facts alleged therein are not").

The court takes judicial notice of the pendency of the *Herron* litigation in state court and the Defendants' representation of the plaintiffs in the *Herron* litigation. However, the court declines to take judicial notice of the exhibits attached to the Defendants' motion in this case, which largely consist of pleadings and transcripts in the *Herron* litigation. The Defendants do not allege that they are entitled to dismissal of this action based on res judicata in a prior judicial proceeding. *See Q Intern. Courier Inc. v. Smoak,* 441 F.3d 214, 216 (4th Cir. 2006) (finding that a "court may take judicial notice of facts from a prior judicial proceeding when the res judicata defense raises no disputed issue of fact"). The facts in the *Herron* litigation remain in dispute. Therefore, the court cannot take judicial notice of the contents of those documents.

B. Analysis

The Defendants argue that the case should be dismissed under Rule 12(b)(6) for the following reasons: (1) the personal information was obtained for the permissible purpose provided in 18 U.S.C. § 2721(b)(4) (hereinafter "litigation exception"); (2) the personal information was obtained for the permissible purpose provided in § 2721(b)(1) (hereinafter "state actor exception"); (3) Plaintiffs Tanner and Weeks have failed to plead that they received a letter from the Defendants; (4) the Plaintiffs have failed to allege that the Defendants "knowingly violated the DPPA"; (5) the

Plaintiffs have failed to plead any actual damages; and (6) "if the DPPA were interpreted to support the Plaintiffs' allegations, the DPPA would be unconstitutional as applied to this situation." (Defs. Mem. Supp. Mot. Dismiss, generally.) The court will address each argument below.

1. Permissible Use – Litigation Exception

Section 2721 permits a state department of motor vehicles ("DMV") to disclose protected personal information[1] for several "permissible uses" listed in § 2721(b). The Defendants allege that there is no violation of the DPPA because they obtained the personal information for the permissible use identified in § 2721(b)(4), which provides that a state DMV may disclose personal information:

> For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or

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[1] "'[P]ersonal information' means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. § 2725(3).

> pursuant to an order of a Federal, State, or local court.

18 U.S.C. § 2721(b)(4). Section 2722 provides that it is "unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b)" and "unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record."

The Defendants submit that they "[o]btained, [d]isclosed and [u]sed the DMV Data for the [p]ermissible [p]urpose of [u]se in [c]onnection with [l]itigation [p]ursuant to Section 2721(b)(4)." (Defs. Mem. Supp. Mot. Dismiss 10.) Specifically, the Defendants submit that the information was obtained in connection with the *Herron* litigation in state court. (*Id.* 10.) The Defendants allege that

> [t]he Complaint does not contain any well-pleaded, nonconclusory factual allegations that plausibly give rise to liability under the DPPA. In addition, the allegations in the Complaint are directly contradicted by public records and the documents Plaintiffs attached to their Complaint. Put simply, the Defendant Attorneys obtained information from the South Carolina DMV for use in connection with the pending *Herron* litigation. That is perfectly legal – and certainly not actionable – under the DPPA, which allows personal information to be obtained

> "[f]or use in connection with any civil . . . proceeding in any . . . court."

(*Id.* 12.)

The court has considered all the evidence properly before this court on a Rule 12(b)(6) motion to dismiss and finds that the Plaintiffs have satisfied their burden to plead a facially plausible claim for relief that the Defendants obtained personal information from the SCDMV without a permissible use in violation of the DPPA. The Defendants sent several FOIA requests seeking the information for the permissible use set forth in § 2721(b)(4). "[A]cquiring personal information from motor vehicle records for the purpose of finding and soliciting clients for a lawsuit is not a 'permissible use' within the meaning of § 2721(b)." *Wemhoff v. District of Columbia,* 887 A.2d 1004, 1012 (D.C. Ct. App. 2005); *see also Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A.,* 525 F.3d 1107, 1114-15 (11th Cir. 2008) (affirming district court's grant of summary judgment to defendant law firm because it obtained the personal information for the permissible purpose of investigation in anticipation of litigation where "the automobile dealers he was litigating against were asserting that plaintiffs needed to plead and prove multiple acts of deceptive and unfair trade practices to state a deceptive and unfair trade practice claim under Florida law" and "the information was used to send one-thousand 'Custom and Practice' letters, which aimed at obtaining evidence showing a

custom and practice of deceptive acts engaged in by dealerships").[2]

The Plaintiffs allege that the Defendants used the personal information obtained to send solicitation letters to the Plaintiffs and others to obtain clients for participation in the *Herron* litigation. Further, the Plaintiffs allege that the Defendants did not have written consent to send the solicitation letters as required by 8 U.S.C. § 2721(b)(12), which allows disclosure of personal information "for bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains." (Compl. ¶ 17.) The Plaintiffs attached to the complaint a copy of one such letter which is labeled **"ADVERTISING MATERIAL"** and informed the recipient that they were likely charged an illegal administrative fee in connection with a recent car purchase and the Defendants "represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging" an improper fee. (*Id.* Exs. G-K.) The Defendants offered a free consultation and notified the recipients of their right to obtain counsel of their choice.

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[2] The Defendants submit additional exhibits related to the proceedings in the *Thomas* case at the district court and appellate level including copies of the Appellant's initial brief and a marking [sic] letter sent to individuals. The court cannot take judicial notice of these documents. Further, the court notes that the district court decided *Thomas* on a motion for summary judgment, not a motion to dismiss as in the instant matter.

The allegations in the complaint sufficiently allege that the Defendants obtained personal information for an improper purpose. Further, the Defendants' argument that they were not soliciting clients because they had an attorney-client relationship with all of the individuals that were sent letters is a disputed factual issue. (Defs. Mem. Supp. Mot. Dismiss 29.) In fact, the Defendants concede that "Defendant Attorneys did not have an express attorney-client relationship with the unnamed Car Buyers." (*Id.* 30.) After consideration of the evidence that is properly before this court in deciding a Rule 12(b)(6) motion, the factual allegations in the complaint are sufficient to satisfy the low bar for pleading a claim for relief.

2. Permissible Use – State Action Exception

The Defendants allege that the personal information obtained from the SCDMV did not violate the DPPA because it allows the disclosure of protected information "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." § 2721(b)(1). The Defendants allege that they are acting "as private attorneys general in lieu of the Attorney General of the State of South Carolina" because they are litigating the case "for the benefit of the whole." (Defs. Mem. Supp. Mot. Dismiss 40.) The FOIA requests sent to the SCDMV

requesting the personal information indicate that the permissible use is the litigation exception in § 2721(b)(4), not the state action exception. The Defendants are not agents of the government. Notably, the Defendants have not alleged that they have provided any information to any government agency. Further, as set forth above, the Plaintiffs have plausibly pled a claim that the Defendants obtained the personal information in violation of the DPPA. Based on the foregoing, the Defendants' motion to dismiss on this ground is denied.

3. Plaintiffs Tanner and Weeks Have Failed to Plead That They Received a Letter From the Defendants

The Defendants contend that Plaintiffs Tanner and Weeks fail to identify which of the five letters they received. This argument is without merit. The complaint states that the Plaintiffs "received the Defendants' advertising and solicitation materials, which were sent in violation of the DPPA." (Compl. ¶¶ 4-6.) This is sufficient to survive a Rule 12(b)(6) motion to dismiss.

4. Knowing Violation of the DPPA

The Defendants maintain that the Plaintiffs have failed to allege that the Defendants "knowingly violated the DPPA." (Defs. Mem. Supp. Mot. Dismiss 51.)

This argument is without merit. 18 U.S.C. § 2724(a) provides that

> [a] person who *knowingly* obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(Emphasis added.)

> [T]o be eligible to recover under the DPPA, a plaintiff must prove that (1) the defendant knowingly obtained, disclosed, or used personal information from her motor vehicle records; and (2) the purpose of such obtaining, disclosure, or use was not permissible. The plaintiff need not show that the defendant knew that the obtaining, disclosure, or use was impermissible.

Pichler v. UNITE, 228 F.R.D. 230, 242 (E.D. Pa. 2005). On appeal, in *Pichler,* the Third Circuit considered whether liability under the DPPA requires that a defendant "*knowingly* obtain or disclose personal information for a use the defendant *knows* is impermissible." 542 F.3d at 396. The Third Circuit held that this argument was "patently without merit" because § 2724(a) creates civil liability for violating those acts or omissions, but does not premise civil liability on knowing violations. *Id.* at 396-97. The court further held that "Congress differentiated between a knowing acquisition, disclosure, or use to establish civil

liability, and any knowing violation to establish liability for a criminal fine." *Id.* at 397. The court agrees that § 2724(a) does not require that the Defendants knowingly violated the DPPA. Therefore, the Defendants' argument that the Plaintiffs' complaint must be dismissed for failure to plead that the Defendants knowingly violated the DPPA fails.

5. Actual Damages

The Defendants allege that the complaint must be dismissed because the Plaintiffs have failed to plead any actual damages. 18 U.S.C. § 2724(b) provides that "[t]he court may award – [for a DPPA violation] (1) actual damages, but not less than liquidated damages in the amount of $2,500." The Third Circuit interpreted § 2724(b) in *Pichler* and held that "'a plaintiff need not prove actual damages to recover liquidated damages'" under the DPPA. *Pichler,* 542 F.3d at 398 (quoting *Kehoe v. Fidelity Fed. Bank & Trust,* 421 F.3d 1209 (11th Cir. 2005)). The Defendants submit that these decisions are contrary to the plain statutory language. The court disagrees and finds that a plaintiff is not required to prove actual damages in order to recover liquidated damages under § 2724(b) of the DPPA. Therefore, this argument fails.

6. Constitutionality of the DPPA

The Defendants argue that "if the DPPA were interpreted to support the Plaintiffs' allegations, the

DPPA would be unconstitutional as applied to this situation. This case – and the underlying *Herron* litigation – involves South Carolina attorneys using South Carolina DMV information to investigate and prosecute cases in South Carolina state court." (Defs. Mem. Supp. Mot. Dismiss 58.) In sum, the Defendants allege that "the Commerce Clause does not allow for regulation of information in this exclusively state matter." (*Id.* 59.) In *Reno v. Condon,* 528 U.S. 141, 148 (2000), the United States Supreme Court held that the DPPA was a constitutional statutory scheme because the personal information "the DPPA regulates is a thin[g] in interstate commerce, and that the sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation." (Internal quotation marks omitted.) The Court found that

> [t]he motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring. Because drivers' information is, in this context, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation.

Id. The Supreme Court has held that the DPPA is a constitutional statute that does not violate the

Commerce Clause. The fact that under the evidence of this case, it may only concern South Carolina residents does not alter this conclusion. Based on the foregoing, this argument fails.

In sum, the Plaintiffs have adequately pled a claim for relief under the DPPA sufficient to survive a Rule 12(b)(6) motion to dismiss.[3]

Therefore, it is

ORDERED that the Defendants' motion to dismiss, docket number 36, is denied.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States
District Judge

Greenville, South Carolina
September 8, 2009

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[3] The Defendants also argue that the "Plaintiffs' claims are indicative of an improper purpose to manipulate the judicial system to serve his car dealer clients in Herron – not the persons whom he purports to represent" in the instant action. (Defs. Mem. Supp. Mot. Dismiss 60.) This argument is not proper for consideration in a Rule 12(b)(6) motion. If the Defendants are attempting to allege that the Plaintiffs' counsel is operating under a conflict of interest, they should file a motion to disqualify counsel.

APPENDIX F

UNITED STATES CODE TITLE 18 – CRIMES AND CRIMINAL PROCEDURE, CHAPTER 123 – PROHIBITION ON RELEASE AND USE OF CERTAIN PERSONAL INFORMATION FROM STATE MOTOR VEHICLE RECORDS

Sec.

2721. Prohibition on release and use of certain personal information from State motor vehicle records.
2722. Additional unlawful acts.
2723. Penalties.
2724. Civil action.
2725. Definitions.

§ 2721. Prohibition on release and use of certain personal information from State motor vehicle records

(a) In General. – A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

(1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or

(2) highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in connection

with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9): *Provided*, That subsection (a)(2) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.

(b) Permissible Uses. – Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and, subject to subsection (a)(2), may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance

monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only –

> **(A)** to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and
>
> **(B)** if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity,

or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.

(12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) Resale or Redisclosure. – An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b)(11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

(d) Waiver Procedures. – A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

(e) Prohibition on Conditions. – No State may condition or burden in any way the issuance of an individual's motor vehicle record as defined in 18

U.S.C. 2725(1) to obtain express consent. Nothing in this paragraph shall be construed to prohibit a State from charging an administrative fee for issuance of a motor vehicle record.

(Added Pub.L. 103-322, Title XXX, Sec. 300002(a), Sept. 13, 1994, 108 Stat. 2099; amended Pub.L. 104-287, Sec. 1, Oct. 11, 1996, 110 Stat. 3388; Pub.L. 104-294, Title VI, Sec. 604(b)(46), Oct. 11, 1996, 110 Stat. 3509; Pub.L. 106-69, Title III, Sec. 350(c), (d), Oct. 9, 1999, 113 Stat. 1025; Pub.L. 106-346, Sec. 101(a) [Title III, Sec. 309(c)-(e)], Oct. 23, 2000, 114 Stat. 1356, 1356A-24.)

§ 2722. Additional unlawful acts

(a) Procurement for Unlawful Purpose. – It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) False Representation. – It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

(Added Pub.L. 103-322, Title XXX, Sec. 300002(a), Sept. 13, 1994, 108 Stat. 2101.)

§ 2723. Penalties

(a) Criminal Fine. – A person who knowingly violates this chapter shall be fined under this title.

(b) Violations by State Department of Motor Vehicles. – Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

(Added Pub.L. 103-322, Title XXX, Sec. 300002(a), Sept. 13, 1994, 108 Stat. 2101.)

§ 2724. Civil action

(a) Cause of Action. – A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) Remedies. – The court may award –

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

(Added Pub.L. 103-322, Title XXX, Sec. 300002(a), Sept. 13, 1994, 108 Stat. 2101.)

§ 2725. Definitions

In this chapter –

(1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

(2) "person" means an individual, organization or entity, but does not include a State or agency thereof;

(3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.[1]

(4) "highly restricted personal information" means an individual's photograph or image, social security number, medical or disability information; and

(5) "express consent" means consent in writing, including consent conveyed electronically that bears an electronic signature as defined in section 106(5) of Public Law 106-229.

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[1] So in original. The period probably should be replaced with a semicolon.

(Added Pub.L. 103-322, Title XXX, Sec. 300002(a), Sept. 13, 1994, 108 Stat. 2102; amended Pub.L. 106-346, Sec. 101(a) [Title III, Sec. 309(b)], Oct. 23, 2000, 114 Stat. 1356, 1356A-24.)

OPPOSITION BRIEF

RECORD AND BRIEFS

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No. 12-25

IN THE

Supreme Court of the United States

EDWARD F. MARACICH, MARTHA L. WEEKS, and JOHN C. TANNER, individually and on behalf of all others similarly situated,
Petitioners,

v.

MICHAEL EUGENE SPEARS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Did the Fourth Circuit properly interpret the Driver's Privacy Protection Act's "litigation exception" to hold that the exception applied where attorneys obtained, disclosed or used personal information in connection with imminent and/or pending litigation filed on behalf of their clients (for the clients' benefit and for the benefit of other injured members of the public), even if the attorneys' conduct could also be characterized as "solicitation"?

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IN THE

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT

Petitioners are car buyers who commenced this putative class action under the Driver's Privacy Protection Act of 1994 ("Act"), 18 U.S.C. §§ 2721, *et seq*. Petitioners' claims stem from mailings they received in connection with a pending South Carolina state court consumer protection lawsuit ("*Herron*").

This case concerns the permissible uses under Section 2721(b) of the Act. The Respondents/ Defendants ("Attorneys") filed *Herron* as attorneys on behalf of car buyers ("Consumers") against car

dealerships ("Dealers") charging illegal fees, alleging, *inter alia*, violations of the South Carolina Manufacturers, Distributors, and Dealers Act ("MDDA"), S.C. Code §§ 56-15-10, *et seq*.

A. The MDDA

South Carolina's MDDA prohibits motor vehicle dealers from engaging "in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public." S.C. Code § 56-15-40. The statute creates a private right of action for damages. In addition, to protect the rights of the South Carolina public, the MDDA includes a private attorney general provision that allows for the filing of a representative action (essentially a class action) "[w]hen such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief." S.C. Code § 56-15-110(2).

B. Chronology of Events in *Herron* Relevant to the Petition

In June of 2006, several Consumers approached some of the Attorneys with complaints of Dealers' unfair practices. Believing that those practices violated the MDDA, the Attorneys began investigating and discovered that the Automobile Dealers Association might have ratified the illegal conduct.

As part of this investigation, on June 23, 2006 a Freedom of Information Act ("FOIA") request[1] was

---

[1] The FOIA requests at issue here will be referred to as the "FOIA Requests."

submitted to the South Carolina Department of Motor Vehicles ("DMV") stating: "I have plaintiffs who have complained of certain conduct as a result of their transactions with car dealers, conduct which I believe to be a potential violation of state law. I am attempting to determine if this is a common practice, and am accordingly submitting this FOIA request." The DMV provided information responsive to this FOIA Request, as it did in response to *all* of the FOIA Requests. On August 24, 2006, a second FOIA Request was sent "in anticipation of litigation . . . pursuant to the exception in 18 U.S.C. § 2721(b)(4)." In an attempt to investigate whether the claimed charging of illegal fees was a common practice, this FOIA Request sought information about automobile sales in five South Carolina Counties from May 1-7, 2006.

On August 29, 2006, the Attorneys commenced *Herron*, naming four individual Consumers as plaintiffs. Because their investigation disclosed that the deceptive practices might be widespread, pursuant to the MDDA's authorization of a representative action, the Attorneys also asserted claims "for the benefit of *all* car buyers who[] paid 'administrative fees'" against 51 named Dealers. The Attorneys alleged the *Herron* claims on behalf of all car Buyers pursuant to the MDDA's authorization of a representative action "[w]hen such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court." S.C. Code § 56-15-110(2).

Between September 2006 and February 27, 2007, various Dealers filed over 180 motions to dismiss in *Herron* arguing that the Consumers' claims should be dismissed for lack of standing. With these motions,

beginning in September 2006, the Dealers began a campaign of arguing that standing rules prohibited the four named Consumers from suing, as representatives, dealers with whom they did not personally deal. The Dealers argued that, for every named Dealer, there had to be a corresponding named Consumer plaintiff who was an actual customer.

On October 26, 2006, after the Dealers began filing motions to dismiss, another FOIA Request was sent seeking information concerning vehicle sales from May 1-14, 2006 by numerous specified Dealers.[2] This FOIA Request stated it was made pursuant to "the exception in 18 U.S.C. § 2721(b)(4)." On October 31, 2006, the Attorneys amended the *Herron* Complaint to add four more Consumer plaintiffs and over 250 Dealer Defendants.[3]

More than five months after *Herron* was commenced and after the filing of numerous motions to dismiss for lack of standing, letters[4] were sent to unnamed Consumers who had been identified through the FOIA Requests.[5] These letters explained:

> We represent a group of consumers in a pending lawsuit arising from South Carolina car dealer-

---

[2] Subsequent FOIA requests were made on January 19, 22, and 23, 2007. These requests were similar in substance, but sought information about different Dealers.

[3] The Attorneys did not discover these additional named plaintiffs through FOIA Requests. In fact, the Letters (defined below) were not sent until well after this date.

[4] The letters at issue in this case allegedly sent by or on behalf of the Attorneys are collectively referred to as the "Letters."

[5] Additional Letters were sent on January 23, 2007, March 1 and 5, 2007, and May 8, 2007.

> ships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee." We believe that these fees are being charged in violation of South Carolina law.
>
> We understand that you may have been charged one of these fees on your recent purchase of an automobile. We obtained this information in response to a Freedom of Information Act request to the South Carolina Department of Motor Vehicles.
>
> The exact nature of your legal situation will depend on facts not known at this time. You should understand that the advice and information in this communication is general and that your own situation may vary. However, we would like the opportunity [to] discuss your rights and options with you in a free consultation. If you are interested in participating in the case or in a free consultation, please mail the enclosed postage paid card. . . .

Out of an abundance of caution, the words "ADVERTISING MATERIAL" and statements required by South Carolina Rule of Professional Conduct 7.3(d)(1)-(3) & (g) were included in the Letters.

On March 9, 2007, the Consumers filed a Memorandum in Opposition to Motions to Dismiss, arguing, *inter alia*, that the MDDA's authorization of suit "for the benefit of the whole" conferred standing on the named plaintiff Consumers to sue *all* defendant Dealers on behalf of all affected Consumers. The Consumers argued that they were not required to name an individual customer plaintiff corresponding to each named Dealer. On April 4, 2007, state court

Judge Doyet A. Early, III held oral argument on the Dealers' motions to dismiss, wherein the Dealers and Consumers maintained their standing arguments.

When a ruling did not immediately follow oral argument, the Attorneys deemed it prudent to take affirmative steps to protect the Consumers' rights by moving to amend the *Herron* complaint to name an individual plaintiff Consumer who had transacted business with each defendant Dealer. This would effectively eliminate the standing issue. Thus, the Consumers moved to amend their Complaint to add 247 named plaintiffs who purchased cars from each named Dealer and came forward because of the Letters. On July 25 and 27, 2007, several Dealers opposed this Motion to Amend Complaint arguing, *inter alia*, that the Attorneys had violated the Act in contacting the newly-named plaintiff Consumers. This opposition was curious, insofar as the proposed amendment would eliminate the standing issues the Dealers raised.

On July 31, 2007, Judge Early denied the Dealers' Motions to Dismiss, ruling that the Consumers had standing and that the Act's private attorney general provision "creates a substantive right" so that a complaint thereunder did not need "to plead and prove the class certification requirements of S.C.R.C.P. Rule 23." Judge Early endorsed the statutory right of the named Consumers to proceed "for the benefit of the whole" and held that the eight named Consumers could sue all of the named Dealers.

Later that day, Judge Early also heard arguments on the Consumers' motion to amend. Judge Early notified the parties of his denial of the Dealers' motions to dismiss, explaining that he "made a ruling on the relationship between the South Carolina Rules

of Civil Procedure 23 and the Code § 56-15-110(2) and in that I found [Title] 56 created a substantive right and Rule 23 was not required to move forward in this case." Judge Early noted that he had "raised consistently" concerns about standing and that those concerns were not a "secret."

Despite the implications of their motions to dismiss, the Dealers opposed the Consumers' motion to amend arguing that the Attorneys improperly used FOIA Requests to "solicit" clients. Judge Early summarily rejected those arguments as irrelevant and stated that his denial of the motions to dismiss foreclosed any issues under the Act. Judge Early indicated he would deny the motion to amend and allow *Herron* to proceed with eight named Consumers against all defendant Dealers; in the interest of efficiency, he encouraged the Dealers to select a group of Dealers to conduct discovery. In suggesting this, he indicated that *Herron* was "like a little class action ... like it's a mass lawsuit." On August 21, 2007, Judge Early denied the Consumers' motion to amend the complaint, concluding that Rule 15, SCRCP, "does not allow the existing plaintiffs to add new plaintiffs to the case in order to assert a claim against the defendant."

On January 31, 2008, Judge Early reconsidered his denial of the Dealers' motions to dismiss. He then held that each named Consumer had representative standing only to sue Dealers with whom he transacted business. He stated that a Consumer could acquire standing to sue Dealers with which he did not transact any business "if that [Consumer], during discovery, obtains evidence sufficient to raise a genuine issue of material fact on whether certain [Dealers] engaged in a civil conspiracy with regard to

charging a closing fee." Judge Early's decision reconfirmed that the named Consumers acted as representatives for unnamed Consumers; he ruled that he did not change his prior ruling that Section 56-15-110(2) created a substantive right to proceed in a representative capacity without the need for Rule 23 class certification.

C. Procedural History of This Case

Petitioners commenced this action on June 23, 2009, by filing a putative class action asserting claims pursuant to the Act based on the Letters they received from Attorneys. On August 3, 2009, the Attorneys filed a comprehensive Motion to Dismiss with a lengthy memorandum in support. On September 9, 2009, the District Court denied that Motion, finding that "the factual allegations in the complaint are sufficient to satisfy the low bar for pleading a claim for relief."

On January 11, 2010, the Attorneys filed a Motion to Stay, arguing, *inter alia*, that discovery might result in the disclosure of protected work-product or privileged information. Thus, on January 25, 2010, the District Court stayed this action for six months. On February 17, 2010, Petitioners moved to lift the stay to request class certification. On March 23, 2010, the District Court lifted the stay to allow for the filing of summary judgment motions because, in part, "the Plaintiffs further stated that they believed that they would not need any discovery to respond to the Defendants' Motion for Summary Judgment." In May 2010, the parties filed cross summary judgment motions and supporting documents. On August 4, 2010, the District Court granted the Attorneys summary judgment, and Petitioners appealed.

The Fourth Circuit affirmed the entry of summary judgment. On appeal, the Petitioners contended that the FOIA Requests and the Letters were not proper under the "litigation exception" of Section 2721(b)(4). Petitioners did not seriously contend that the FOIA Requests and the Letters were not "in connection with" the *Herron* litigation. Instead, Petitioners argued that – because the Letters could be characterized as "solicitation" – the "litigation exception" could not apply as a matter of law. The Fourth Circuit rejected Petitioners' argument, holding that even if the Attorneys engaged in "solicitation," their conduct could still fall within the scope of the "litigation exception." The instant Petition followed.

REASONS FOR DENYING THE PETITION

A. PETITIONERS COMPLICATE THE FOURTH CIRCUIT'S DECISION

Under the Act, "[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains." 18 U.S.C. § 2724(a). The Act prohibits state DMVs from disclosing personal information, unless an exception applies. *See* 18 U.S.C. § 2721(a). Those exceptions (14 in all) are enumerated in Section 2721(b), including:

> Personal information referred to in subsection (a) . . . may be disclosed as follows: . . .
>
> (4) For use in connection with any civil . . . proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforce-

> ment of judgments and orders, or pursuant to an order of a Federal, State, or local court.[6] . . .
>
> (12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.[7]

Petitioners carry the burden of proving that the Act did not permit the Attorneys' conduct. *See Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A.*, 525 F.3d 1107, 1111 (11th Cir. 2008); *accord Bailey v. Daniels*, 679 F. Supp. 2d 713, 720 (W.D. La. 2009) ("[T]he plaintiff must carry the burden of establishing that the defendant's intended use for the information was not permitted under the DPPA.").

The Attorneys have asserted in this case that their conduct was permitted under the "litigation exception" of subsection (b)(4) because their conduct was all "in connection with" *Herron*. Petitioners do not seriously dispute this. Rather, Petitioners contend that the Attorneys' challenged conduct – even if "in connection with" *Herron* – can be characterized as "solicitation" and, therefore, is permissible *only* if consent was granted under the "bulk solicitation exception" of subsection (b)(12). At its heart, Petitioners' argument boils down to this: to be permitted under the Act, a disclosure or use of information must satisfy *all* potentially-applicable exceptions.

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[6] Under the "litigation exception" of Section 2721(b)(4), both "personal information" and "*highly restricted* personal information" may be disclosed. *See* 18 U.S.C. § 2721(a)(2).

[7] Under the "bulk solicitation exception" of Section 2721(b)(12), only "personal information" may be disclosed, not "highly restricted confidential information."

The Attorneys countered that the fourteen exceptions under the Act are individual and independent of each other. They are separate exceptions, not cumulative conditions to permissible use. To be permissible, a disclosure of information need satisfy *only* one exception. As a result, unless the Petitioners could show that Attorneys' conduct fell outside of *all* of the exceptions, their claims had to fail. The undisputed evidence showed that the FOIA Requests and actual use of information were "in connection with" the *Herron* litigation. The characterization of their alleged conduct as "solicitation" was irrelevant to whether the Attorneys could be held liable under the Act.

The Fourth Circuit's central holding – agreeing with the Attorneys – was clear and uncontroversial:

> In short, where as a matter of settled state law and practice, as here, solicitation is an accepted and expected element of, and is inextricably intertwined with, conduct satisfying the litigation exception under the DPPA, such solicitation is not actionable by persons to whom the personal information pertains.

(*See* Pet. App., at p. 5a; *accord* Pet. App., at p. 39a). The Fourth Circuit merely held – consistent with decades of law governing statutory interpretation – that a party falling within one exception to liability may not be held liable. Petitioners attack this holding claiming that it "muddle[s] an already complex area of law" and threatens "profoundly troubling policy implications." (*See* Petition, at p. 12). Petitioners' suggestion that the Fourth Circuit somehow crafted a complicated or questionable rule of law is not in line with reality. To the contrary, the Petition injects

needless complexity into a straightforward statutory interpretation.

As discussed above, the Act provides that personal information may not be disclosed except as fourteen separate and independent exceptions permit. *See Reno v. Condon*, 528 U.S. 141, 145 (2000) ("The DPPA's prohibition of nonconsensual disclosures is also subject to a number of statutory exceptions."). These exceptions are not *conditions* that must *all* be satisfied; rather, they are alternative routes to permissibility under the Act. None of the exceptions are given precedence in application over the others. Nothing in the Act suggests that if a use is permissible under one exception it must also satisfy other potentially relevant exceptions. Petitioners' contention finds no support in the language or logic of the Act. The Petitioners would write a "not solicitation" requirement into Section 2721(b)(4) where Congress did not.

B. THE FOURTH CIRCUIT DID NOT CREATE A NEW "INEXTRICABLY INTERTWINED TEST"; IT MERELY RENDERED A CORRECT INTERPRETATION OF THE ACT

Petitioners devote substantial attention to the Fourth Circuit's use of the phrase "inextricably intertwined." Petitioners apparently do so to suggest that the Fourth Circuit created a new legal "test" of general application that conflicts with prior law. As the Attorneys will discuss herein, the Fourth Circuit's opinion does not squarely conflict with any prior law. However, before undertaking that effort, the Attorneys wish to accurately clarify what the Fourth Circuit did in this case.

On appeal, Petitioners contended, *inter alia*, that the claimed use "in connection with" litigation was a subterfuge for "solicitation." According to Petitioners, the issue confronting the Fourth Circuit was whether the Attorneys' conduct was within the "litigation exception," even though it was also "solicitation." The Fourth Circuit did conclude that the Attorneys' conduct could be considered "solicitation." (*See* Pet. App., at pp. 25a-29a). However, the Fourth Circuit then noted that "this determination is not dispositive." (*See id.*, at p.29a).

> [Petitioners] contend that the district court erred in ruling that, as a matter of law, the nonconsensual use of personal information for solicitation is nonetheless non-actionable under 18 U.S.C. § 2724, see supra n.5, if the solicitation is sufficiently tied to a permissible use under the litigation exception. In other words, and more generally, the Buyers urge a theory of DPPA liability in which any impermissible use of personal information, e.g., solicitation absent consent, would violate the statute (and support a damages action), even if, concomitantly, the personal information is put to a permissible use, i.e., in litigation.
>
> For the reasons explained below, *without undertaking to lay down a rule applicable in all future cases*, we are persuaded that the most rational resolution of the manifest tension between the solicitation and litigation exceptions under the DPPA compels us to reject the Buyers' absolute rule.

(*See id.*, at p. 30a (emphasis added)). Specifically, the Fourth Circuit held that under the unique circumstances of this case the "litigation exception" applied,

notwithstanding the alleged "solicitation," if such "solicitation" was "in connection with" *Herron:*

> We therefore hold that as to DPPA provisions (b)(4) and (b)(12), conduct that might, prima facie, amount to prohibited solicitation (i.e., that prohibited absent express consent) leading to a disclosure of personal information, does not give rise to a cognizable claim under the DPPA when such *use in solicitation is coextensive with, and inextricably intertwined with, conduct expressly permitted pursuant to the litigation exception.* [Citation omitted.] We determine next whether the district court erred in concluding that the litigation exception applies to the undisputed facts reflected in the record of this case.

(*See* Pet. App., at p.39a (emphasis added)).

As both the Fourth Circuit and the district court recognized, the Attorneys' use of information was directly related to the litigation of *Herron*. For example, before *Herron* was filed, information was sought to determine whether a large number of Dealers engaged in prohibited practices and the scope of those practices. If the action was "of common or general interest to many persons" too numerous to join, the Attorneys could file a representative MDDA suit "for the benefit of the whole." S.C. Code. § 56-15-110(2). The first pre-suit FOIA Request, dated June 23, 2006, confirms this purpose:

> This is a Freedom of Information request in anticipation of litigation ... pursuant to the exception in 18 U.S.C. § 2721(b)(4) of the Driver's Privacy Protection Act of 1994 (copy enclosed).
>
> I have plaintiffs who have complained of certain conduct as a result of their transactions with car

> dealers, conduct which I believe to be a potential violation of state law. I am attempting to determine if this is a common practice, and am accordingly submitting this FOIA request.

The second pre-suit FOIA Request asked for the same information from a larger geographical area, again "pursuant to the exception in 18 U.S.C. 2721(b)(4)." Both FOIA Requests were part of the investigation in anticipation of litigation. They were made within 60 days of filing *Herron*, with the second coming only five days before filing. None of the personal information obtained from these FOIA Requests was used to identify or contact the eight named *Herron* plaintiffs, who had independently approached the Attorneys. The purpose of obtaining the DMV information was clearly not, as Petitioners claim, to solicit new clients for a theoretical future lawsuit. Rather, these requests were designed to assist in the analysis of a potential and later pending lawsuit to be filed on behalf of already extant clients. Petitioners cannot genuinely dispute this fact since the Attorneys did not communicate with any unnamed Consumers until five months *after* filing *Herron*.

Once the Attorneys commenced *Herron*, there existed active, pending litigation with real named plaintiffs and represented absent Consumers. Defendant Dealers subsequently moved to dismiss the claims of all unnamed Consumers against Dealers for whom there was no corresponding named Consumer. To the extent that unnamed Consumers could be identified, the Attorneys could use that information to oppose the Dealers' motions to dismiss. If the motions to dismiss were granted, unnamed Consumers, unaware of their rights and unable to make

informed decisions about their participation in *Herron*, could have lost their claims. The DMV information at issue here was obtained and used in order to resolve a highly contested issue in pending litigation – the standing of the named Consumers to represent the unnamed Consumers. It was the Dealers – some represented by Petitioners' original attorneys in this lawsuit – who filed motions to dismiss challenging the standing of unnamed Consumers. The post-commencement FOIA Requests were submitted in response to those motions and in an effort to gather information and witnesses in support of their claims.[8]

As the state trial court ruled, *Herron* is not a "class action" under Rule 23, of the South Carolina Rules of Civil Procedure, but is a group representative action under the South Carolina MDDA analogous to a class action,[9] in which named Consumers represent unnamed Consumers and proceed for the "benefit of the whole," albeit without formal class certification.

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[8] The motions to dismiss were filed between September 2006 and February 12, 2007. The post-suit FOIA Requests are dated October 26, 2006 through January 23, 2007, and the Letters communicating with the unnamed Consumers were dated January 3 through May 8, 2007.

[9] Section 56-15-110(2) is a substantive statute that authorizes a representative suit under circumstances similar to some of the factors that a class action under Rule 23. *Compare* S.C. Code § 56-15-110(2) (where the action is of "common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole ....") *with* Fed. R. Civ. P. 23(a)(1) & (2) (authorizing a representative suit if, (among other requisite factors inapplicable in a representative suit under the MDDA), "the class is so numerous that joinder of all members is impracticable" and "there are questions of law or fact common to the class.").

With the filing of this representative action, the unnamed Consumers' legal interests were directly implicated and afforded protection. While the Attorneys did not have an express attorney-client relationship with unnamed Consumers, their professional and fiduciary obligations to them were nonetheless imperative. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) ("[C]lass attorneys ... owe the entire class a fiduciary duty once the class complaint is filed."), *cert. denied*, 516 U.S. 824 (1995); *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14, 18 (2d Cir. 1986) ("C]lass attorney's duty does not run just to the plaintiffs named in the caption of the case; it runs to all of the members of the class"); *Kingsepp v. Wesleyan Univ.*, 142 F.R.D. 597, 599 (S.D.N.Y. 1992) ("[T]he role of class counsel is akin to that of a fiduciary for the class members"); *Wagner v. Lehman Bros. Kuhn Loeb*, 646 F. Supp. 643, 661 (N.D. Ill. 1986) (stating class counsel "stands in a fiduciary relationship with the absent class"); *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 (3d Cir. 1973) ("class action counsel possess, in a very real sense, fiduciary obligations to those not before the court"). Thus, at a minimum, upon filing a representative suit on behalf of a group of persons (some unnamed), the Attorneys owed a fiduciary obligation toward unnamed members. In accordance with that duty, "'[s]olicitation' of parties to help maintain the action on behalf of the putative group "may be entirely appropriate, **if not required**, as part of class counsel's fiduciary duty" to the group. *In re Avon Sec. Litig.*, 1998 WL 834366, at *10 (S.D.N.Y. Nov. 30, 1998) (emphasis added). Once the Attorneys filed *Herron*, their subsequent communications to inform the unnamed Consumers about the suit and deter-

mine their interest in joinder to protect their claims from the Dealers' standing challenges was not a ploy to solicit new business, but was a necessary part of their professional obligations to members of the represented "class."

Moreover, as the Fourth Circuit observed, Petitioners have never even attempted to factually dispute that the Attorneys' conduct was "in connection with" the *Herron* litigation:

> [Petitioners'] arguments throughout the proceedings below had been focused solely on the applicability of the litigation provision as a matter of law, *i.e.*, that it did not protect the use here because the solicitation provision applied, as well and imposed liability regardless of any other permitted use. They did not, however, produce or suggest any evidence that the provision did not apply as a factual matter.

(*See* Pet. App., at p.41a).

In light of the foregoing, the Fourth Circuit concluded that the Attorneys' "solicitation" was "inextricably intertwined" with the use of personal information "in connection with" the *Herron* litigation. The context makes clear that the "inextricably intertwined" language used in the Fourth Circuit's opinion did not create a new legal test. Rather, the court simply held that, because, in this case, solicitation was inextricably intertwined with use "in connection with litigation," Section 2721(b)(4) applied. In other words, even though the conduct could be considered "solicitation," that did not preclude it from also being use "in connection with" litigation.

This was not a new test. Rather, this was simply a plain construction of the Act's provisions as applied to the particular factual circumstance before the court. The Fourth Circuit expressly held that, in resolving the claimed tension between the "litigation" and "bulk solicitation" exception, it was not "undertaking to lay down a rule applicable in all future cases." (See id., at pp. 29a-30a). Rather, the Fourth Circuit simply decided that, under the facts before it, the Attorneys' conduct was sufficiently connected to the *Herron* litigation to render the fact that it could also be called "solicitation" irrelevant.

The Fourth Circuit's holding is consistent with the respect that the Act affords to attorneys' litigation activities. The Act recognizes that use of DMV data in connection with litigation is a paramount interest; it permits the release of even "highly restricted personal information"[10] without consent of the individual to whom the information pertains for that

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[10] The Act provides different degrees of protection to information, depending upon whether it is "personal information" or "highly restricted personal information":

> (3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.
>
> (4) "highly restricted personal information" means an individual's photograph or image, social security number, medical or disability information;

See 18 U.S.C. § 2725(3) & (4).

use. 18 U.S.C. § 2721(a)(2).[11] Although Petitioners minimize the "litigation exception," the Act grants that exception broad application.

C. THERE IS NO CONFLICT IN THE LAW APPROPRIATE FOR REVIEW

Petitioners suggest that this Court should grant *certiorari* because the Fourth Circuit's opinion creates law that is in conflict with prior caselaw. (*See* Pet. for Writ of Certiorari, at pp. 13-14). However, as discussed above, the Petitioners' statement of the two issues misstates what the Court of Appeals did. Moreover, for the reasons discussed below, the Fourth Circuit's opinion does not squarely conflict with any prior law, and, consequently, this is not an appropriate case for *certiorari*.

1. There Is No Irreconcilable Conflict Between the Fourth Circuit's Opinion in This Case and Prior Precedent From the Third Circuit and the District of Columbia Court of Appeals (Petitioner's Claimed First Issue)

Petitioners first argue that the Fourth Circuit creates a conflict with other cases as to the issue of whether "pure solicitation of clients qualifies as a permissible use under the litigation exception of the Act." However, these cases can be reconciled with this case, because they are factually distinguishable.

Petitioners first cite *Pichler v. UNITE*, 585 F.3d 741 (3d Cir. 2009) ("*Pichler VII*"). In *Pichler VII*, a

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[11] By comparison, the "bulk solicitation" exception only permits disclosure of "personal information" (and then only upon consent). *See* 18 U.S.C. § 2721(a).

union ("UNITE") launched an organizing campaign targeting CINTAS Corporation. In an effort to contact CINTAS employees at home, UNITE, *inter alia*, recorded license plate numbers of cars parked in CINTAS parking lots in a process called "tagging." UNITE used those numbers – through Westlaw searches and third-party "information brokers" – to obtain personal information from databases containing state motor vehicle records. According to Westlaw, UNITE conducted about 13,700 searches. Of the total searches, only about 1,500 pertained to CINTAS. The remaining approximately 12,000 did not pertain to individuals related to the labor organizing campaign at CINTAS. UNITE was then sued in a class-action alleging violations of the Act through the tagging process, and it was ultimately determined that UNITE violated the Act. During that litigation, UNITE obtained a protective order preventing CINTAS from using information obtained in the lawsuit as a weapon against the organizing effort. Among the information that the order protected was the personal information of the 12,000 people who were not connected to the organizing campaign.

The National Right to Work Legal Defense Foundation ("NRTW") sought to intervene and have the protective order amended to permit it to obtain information about those 12,000 people. NRTW claimed that it wanted the information to inform those individuals, who were outside the class that had sued UNITE, that UNITE obtained personal information in violation of the Act. The district court refused to modify the protective order because NRTW had no right of access to the documents.

The Third Circuit affirmed the District Court's refusal to modify the protective order, holding that

NRTW's proposed use for the disputed information was impermissible under the "litigation exception":

> The records the NRTW is seeking will not advance the inquiry of any decisionmaker charged with deciding any claims under the DPPA that may arise from disclosure to the NRTW. The information the NRTW wants to obtain would do nothing more than identify potential litigants and claimants who may wish to pursue remedies for UNITE's violation of the DPPA. That is not enough to compromise the privacy afforded motorists by the DPPA. In fact,
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> > The least sympathetic case for discovery sharing is presented by a request for access on behalf of someone who is *merely contemplating* the commencement of litigation. The risk of a *fishing expedition* or some other form of mischief is greatest in this context. The safest course seems to be denial of discovery sharing until the requesting party actually has begun a lawsuit, unless he demonstrates extraordinary need.
>
> Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L.Rev. 427, 499 (1991).
>
> UNITE's use of the information obtained through tagging was impermissible because it amounted to *nothing more than discovery of potential plaintiffs*.

Id. at 752 (emphasis added).

The Fourth Circuit's opinion here does not conflict with *Pichler VII*. The logic of the two cases is consistent, and their different results stem from vastly

different facts. In *Pichler VII*, the NRTW literally wanted to use the "litigation exception" to drum up speculative litigation. There were no existing clients. There was no pending or imminent lawsuit. There was simply an organization that wanted to engage in a fishing expedition to find potential litigants to see if a lawsuit *might* follow. The "solicitation" of clients could not be "in connection with" any litigation, pending or anticipated; any litigation was purely hypothetical. *Pichler VII* correctly held that the "litigation exception" does not permit – whether through "solicitation" or otherwise – personal information to be used to manufacture a lawsuit.

Here, in contrast, the Fourth Circuit addressed a scenario where litigation – with actual, existing clients – was either imminent or actually pending. The so-called "solicitation" was not used to locate potential litigants in the first instance. The pre-filing FOIA Requests were intended to discover the scope of the alleged misconduct and identify high-volume dealers. The *Herron* lawsuit was initially filed with named plaintiffs who came to the Attorneys and were not located through the FOIA Requests. The subsequent FOIA Requests obtained information that the Attorneys used to oppose motions to dismiss that the Dealers filed in *Herron* and in furtherance of the Attorneys' obligation to discover unnamed parties with interests in the representative *Herron* action. The instant case is facially distinguishable from *Pichler VII*. The Fourth Circuit's logic, however, is entirely consistent with *Pichler VII*.

The Fourth Circuit did not announce any legal principle of general application in conflict with the law of the Third Circuit. Because there is no "square conflict" with the law of the Third Circuit, the Court

should not grant certiorari. *See Frank v. United States*, 506 U.S. 932, 932 (1992) ("[T]he Court's action is supported by the fact that a square conflict between two Courts of Appeals has not arisen since the enactment of the 1984 statute, and by the Court's normal practice of awaiting such a conflict before considering the significance of new federal legislation."); *Miroyan v. United States*, 439 U.S. 1338, 1339 (1978) ("While there is undoubtedly a difference of approach between the Circuits on the question, I am not sure that there is a square conflict, and I am even less sure that the granting of certiorari in this case would result in the resolution of any conflict which does exist.") (Rehnquist, J.) (denying motion to stay Circuit Court mandate).

Petitioners also argue that the Fourth Circuit opinion is inconsistent with *Wemhoff v. District of Columbia*, 887 A.2d 1004 (D.C. Ct. App. 2005), which held that "[a]cquiring personal information from motor vehicle records for the purpose of finding and soliciting clients for a lawsuit is not a 'permissible use' within the meaning of § 2721(b)." (Petition, at p. 17). In *Wemhoff*, the DMV denied a lawyer's request for the addresses of motorists receiving traffic citations from a malfunctioning traffic camera. Wemhoff filed, without having a named plaintiff, a class action suit styled *Thousands of Motorists to be Identified v. District of Columbia*. It was summarily dismissed because Wemhoff did not name a single actual plaintiff. *Id.* at 1107 n.1.

Unlike the Attorneys, Wemhoff had no attorney-client relationship with any person and had no pending or imminent lawsuit on behalf of a client. Unlike the Attorneys, Wemhoff had no fiduciary obligations to investigate or obtain information to

protect the rights of any person. As the Fourth Circuit noted, *Wemhoff* is "plainly distinguishable" from this case, because the attorney in that case "was merely trolling for clients in the hope that litigation *might be in the offing*." (*See* Pet. App., at p. 36a n.13 (emphasis added)). Here, there is no evidence that the Attorneys "trolled" for clients to start a lawsuit; rather, their conduct was all in connection with litigation filed for their named clients (and on behalf of others similarly situated). There is no conflict at all, let alone a square conflict, between the Fourth Circuit and *Wemhoff*.

In sum, there is no conflict in the law regarding whether conduct is automatically disqualified from being "in connection with" litigation simply because it can be characterized as "solicitation." Petitioners cite to no case setting forth such a black letter rule of law.[12] The *Pichler* and *Wemhoff* cases certainly do

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[12] Petitioners cite *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A.*, 525 F.3d 1107 (11th Cir. 2008) to suggest that – consistent with their reading of *Pichler VII* and *Wemhoff* – the "litigation exception" cannot apply where an attorney "solicits." However, Petitioners' cited language from *Thomas* is not a substantive discussion of the Act but merely a suggestion that it is not unfair to require a plaintiff to carry the burden of proving that no exceptions apply since most of the exceptions are tied to certain professions or scenarios (and which exceptions might apply would, consequently, be knowable to a plaintiff):

> Many of the § 2721(b) enumerations are tied to a particular occupation or organization and its corresponding lawful need for the information. . . Finally, the remaining three enumerations only apply when the plaintiff has provided consent. See 18 U.S.C. § 2721(b)(11)-(13).
>
> Thus, for example, if a plaintiff names a law firm (as here) or an insurance agency as the defendant, there is a high probability that subsection (b)(4) is at issue in the former

not set forth such a rule; rather, they held that the "litigation exception" did not apply under their facts because the defendants were literally engaging in speculative expeditions to generate a lawsuit. These cases can be harmonized with the Fourth Circuit.

2. There Is No Irreconcilable Conflict Between the Fourth Circuit's Opinion (and Cited Law From the Eleventh Circuit) and the Third Circuit (Petitioners' Claimed Second Issue)

Petitioners argue that there is a legal conflict among the following courts as to the question of whether liability may be imposed where a proper use follows an allegedly improper original use:

(a) The Fourth Circuit in this case and the Eleventh Circuit in *Rine v. Imagitas, Inc.*, 590 F.3d 1215 (11th Cir. 2009);

(b) The Third Circuit in *Pichler v. UNITE ("Pichler V")*, 542 F.3d 380 (3d Cir. 2008); and

(c) Judge Sloviter's dissent in *Pichler V*[13] and a subsequent decision of the Pennsylvania Commonwealth Court in *Hartman v. Depart-*

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and (b)(6) in the latter. Similarly, if a plaintiff is a recipient of a mass marketing letter, it is no secret that (b)(12) is at issue, which allows for bulk distribution of solicitations only if express consent is obtained.

Id. at 1113-14.

[13] Petitioners do not make clear how a dissenting opinion can be used to create a "conflict" supporting the granting of *certiorari*.

ment of Conservation and Natural Res., 892 A.2d 897 (Pa. Commw. Ct. 2006).

However, contrary to Petitioners' contention, there is no square legal dispute among these cases.

First, *Pichler V* is consistent with the Fourth Circuit. In *Pichler V*, UNITE was "tagging" (using license plate numbers and Westlaw searches to locate addresses) during a union organizing effort at CINTAS. A secondary element of that organizing strategy involved locating potential claimants for a lawsuit against CINTAS. Thus, the information was literally used in two completely different manners (although toward a common union organizing end). While the information in *Pichler V* could arguably be used to locate litigants for a theoretical lawsuit, it was first separately used for union organization activities that did not include litigation. The Third Circuit merely reached the unremarkable holding that where there was a completely independent and separate *use* of information *wholly unrelated to litigation*, DPPA liability could attach for that impermissible use. *See Pichler V*, 542 F.3d at 395 ("Because UNITE obtained and used the confidential information for an impermissible purpose – union organizing – it does not matter what other permissible purpose UNITE may have had."). The crux of *Pichler V* is that a party cannot "launder" an improper use of personal information through a proper use.

The instant case is factually distinguishable from *Pichler V* but is consistent with its logic. Although Petitioners characterize the Attorneys' conduct as having multiple purposes, it is undisputed that the Attorneys *only* used the information "in connection with" litigating *Herron*. That the Fourth Circuit

stated that such use could also be characterized as "solicitation" does not change the fact any solicitation was also "in connection with" the litigation of litigating *Herron* – including determining the scope of the Dealers conduct and responding to motions to dismiss concerning standing. There is no evidence that the Attorneys "used" the information to solicit clients for matters other than *Herron*, nor is there evidence that the Attorneys made commercial use of protected information for general marketing. Rather, as detailed above, the FOIA Requests and the Letters were only used "in connection with" *Herron*. Nothing in *Pichler V* makes such use improper. *Pichler V* only states that where there are distinctive and separate uses of information, each must be permissible. Petitioners seek to twist *Pichler V* to rewrite the Act to require that a use of DMV information satisfy all of the Act exceptions, a result that is inconsistent with the language of the Act.

Moreover, contrary to Petitioners' suggestion, *Pichler V* does not conflict with the Eleventh Circuit's *Rine* opinion. In *Rine*, the court held that, where the "state action" exception was met, a use did not also need to meet the "bulk solicitation exception":

> Plaintiff-appellants argue that even if subsection 2721(b)(1) generally applies, subsection 2721(b)(12), which specifically addresses the bulk distribution of marketing and solicitation materials, must be complied with instead. . . . Both are exceptions to the general prohibition against the disclosure of drivers' personal information. Subsection (b)(1) applies to a situation not addressed by subsection (b)(12) and vice versa. [T]his case involves two statutory provisions that potentially apply. *While these provisions may overlap, they*

> *both apply to situations not governed by the other and both must be given effect unless they "pose an either-or proposition."* [(Citation omitted)]. *Furthermore, nothing in the DPPA suggests that the (b)(12) exception alters the scope or meaning of the separate and independent exception found in subsection (b)(1).* As such, the statutory exceptions found in section 2721(b) are *not mutually exclusive, meaning that any one or more of them may be applicable to a given situation.*

See Rine v. Imagitas, Inc., 590 F.3d 1215, 1225-26 (11th Cir. 2009) (affirming summary judgment) (emphasis added). The Fourth Circuit relied heavily on *Rine* and its construction of the plain language of the Act. The holding in *Rine* (and in this case) was that a use need only fall within one exception to the Act to avoid liability. In *Pichler V*, the Third Circuit held that where there are multiple *uses* of information (there, home visits to organize a union and efforts to start litigation), each *use* must fall within an exception. *Pichler V* prohibits a party from using a permissible use to shield a second improper use of information, and is entirely consistent with both *Rine* and the Fourth Circuit.

Finally, Petitioners cite a Pennsylvania state court case, *Hartman v. Department of Conservation and Natural Res.*, 892 A.2d 897 (Pa. Commw. Ct. 2006). In *Hartman*, a publisher of the magazine of a snowmobile association sought information regarding registered snowmobile owners so he could mail his magazine to snowmobile owners. The publisher argued that he was entitled to the information under the Act under a "driver safety" exception because one issue of the magazine included safety articles. The

court held that this was insufficient to trigger the "driver safety" exception:

> Although Hartman contends he requested the information to promote snowmobile safety, it is clear the requested information would be used primarily to promote snowmobiling in Pennsylvania and membership in the PSSA. The mere placement of safety information in one edition of the magazine cannot transform a commercial use into a "use in connection with matters of motor vehicle or driver safety." 18 U.S.C. § 2721(b)(2).

Id. at 905.

This is consistent with the Fourth Circuit and the other cases Petitioners cite (and, even if it was inconsistent, a lone state court case does not create a "conflict warranting" this Court's review). *Hartman* does not turn upon multiple uses or tension between exceptions. Rather, the issue in *Hartman* was whether, as an evidentiary matter, Hartman could show – this was not an action for damages, but Hartman litigating against the Commonwealth seeking disclosure – that he was within a permissible use. The court simply concluded that the inclusion of safety information in a single issue of a magazine was insufficient to satisfy the exception. There is nothing about this holding in conflict with the Fourth Circuit's interpretation of the Act.

The fact that no conflict exists is bolstered by the First Circuit's recent case, *Downing v. Globe Direct, LLC*, 682 F.3d 18 (1st Cir. 2012). There, the Commonwealth of Massachusetts DMV entered into an arrangement wherein Globe, a third-party contractor, would send out drivers' license renewal information

and include, along with that information, advertisements. The DMV retained the right to approve advertisements and received a portion of revenues from those advertisements. The DMV also was to provide Globe with driver information to permit it to perform its work under this arrangement. A disgruntled driver who received advertising solicitation with his renewal forms sued Globe under the Act.

The First Circuit held that this arrangement was within the "state action" exception of the Act, found at 18 U.S.C. § 2721(b)(1). The plaintiff there argued – much as Petitioners do here – that the more appropriate exception to consider the propriety of Globe's conduct was the "bulk solicitation exception" of Section 2721(b)(12). The First Circuit, as the Fourth Circuit did here, held that the Act's exceptions are independent and that a defendant need only fall within one exception:

> The structure of the DPPA supports the idea that one permissible use does not define or control another. Each "permissible use" under subsection (b) is a specific carve-out from liability. Once a person's activities are deemed to fall within *one of the carve-outs, subsection (a)'s general rule of nondisclosure no longer applies. . . . Each "permissible use" under subsection (b) is like a key to unlock a door through which a person may go* to escape DPPA liability. So long as Globe Direct may unlock the (b)(I) door, the fact that they may or may not possess the key to the (b)(12) door is irrelevant to our inquiry.

Id. at 23 (emphasis added). The First Circuit also distinguished itself from *Pichler V* and, *citing the Fourth Circuit's opinion*, held that *Pichler V* did not

require the imposition of liability under the facts before the First Circuit:

> This situation is unlike that in *Pichler [V]*, where the primary (and impermissible) purpose of collecting the statutorily protected personal information was union organizing, which the court found the union had "attempt[ed] to mask ... behind the veil of a [permissible and severable] litigation purpose." *Id.* at 396. Here, the advertising function is inextricably linked to the proper government functions of registration renewal and increasing the availability of funds for RMV programs. We think that the integration of the advertising into the structure of the program renders that advertising a part of the government function exempted from the statute's reach under subsection (h)(I).
>
> We are not alone in this line of analysis. Post-*Pichler [V]*, both the Fourth and Eleventh Circuits have declined to impose DPPA liability where solicitation or advertising was part and parcel of a permissible use of statutorily protected information.

Id. at 24. As the First Circuit held, the case law is not in conflict, but rather can be harmonized by analyzing the facts of each case.

As set forth above, Petitioners have failed to show a square conflict between the law stated in this case and the law stated in other cases. To the contrary, in terms of the law applied, this case is entirely consistent with the cases Petitioners cite.

D. EVEN IF THERE ARE CONFLICTS IN THE CASELAW, NUMEROUS OTHER FACTORS MAKE THIS CASE A POOR VEHICLE FOR THE COURT TO RESOLVE SUCH PERCEIVED CONFLICTS

Even accepting Petitioners' position that conflicts exist between the lower courts, this case is not a "clean vehicle" for the Court to resolve those claimed conflicts.

1. Important Issues of State Law Make This Case Inappropriate for Review

To resolve the applicability of the "litigation exception," this Court would be required to construe issues of South Carolina procedural law, state law governing representative claims, and substantive issues under the MDDA. As set forth above, the Attorneys' uses of personal information were made in the context of a procedurally complex representative action arising under South Carolina statutory law. Information was obtained to determine whether a representative claim under the statute might exist in the first instance. Information was also obtained to oppose motions to dismiss under South Carolina state law. The Fourth Circuit relied upon several findings by state court Judge Early to analyze the relationship between the Attorneys and the Consumers. Thus, before this Court could ever get to a "clean" issue under the Act, it would have to navigate a complicated factual background containing nuanced procedural and substantive questions arising under South Carolina state law.

2. Policy Considerations Do Not Support the Granting of *Certiorari*

Petitioners suggest that *certiorari* is proper because the Fourth Circuit "muddled an already complex area of federal law" and reached a decision with "profoundly troubling policy implications." (*See* Pet., at p.12). To the contrary, the Fourth Circuit's opinion is consonant with sound public policy.

The Fourth Circuit noted that its holding was supported, in part, by the fact that the Attorneys' conduct was undertaken in good faith and in compliance with their ethical obligations:

> In the context of the circumstances presented in this case, it is no stretch to say that the Lawyers simply could not make appropriate, efficient and ethical use of the Buyers' personal information under our pragmatic approach to the litigation exception without first engaging in solicitation, and they did so in a manner that was *entirely in keeping with applicable state ethics norms*. Put simply, *they did what any good lawyer would have done*; Congress *could not possibly* have intended to impose DPPA liability under such circumstances.

(*See* Pet. App., at p.38a (emphasis added)). In other words, the Fourth Circuit held that, in addition to being proper under the Act, the Attorneys' conduct was ethical and proper under the circumstances. Petitioners seek to impose liability upon Attorneys for conduct that the Fourth Circuit held was not only proper, but was "what any good lawyer would have done." The Fourth Circuit's construction, authorizing attorneys to ethically act in their clients' best interests, furthers proper public policy. On the other

hand, Petitioners second-guess Attorneys' professional judgment and inject undue complexity into attorney-client relationships.

3. There Are Numerous Independent Sustaining Grounds

Because of its decision regarding the "litigation exception," the Fourth Circuit did not analyze numerous additional, independent grounds to affirm summary judgment:

(a) The Attorneys' conduct was permissible under the Act's "state function exception" because (as the *Herron* court determined) the Attorneys prosecuted *Herron* on behalf of the public acting as "private attorneys general."

(b) The Act requires Petitioners to prove that the Attorneys knew that they used information for an impermissible purpose, and the record is devoid of such evidence. *See* 18 U.S.C. § 2724(a).

(c) The Act requires proof of "actual damages," and there is no evidence of same.

(d) Petitioners' construction of the Act could render it unconstitutional under the commerce clause.

CONCLUSION

Even if this Court grants *certiorari* and vacates the Fourth Circuit's decision, numerous additional statutory and constitutional issues will remain to be decided on summary judgment.

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August 6, 2012

REPLY BRIEF

RECD
AND
BRIEFS

No. 12-25

In The Supreme Court of the United States

EDWARD F. MARACICH, MARTHA L. WEEKS, AND JOHN C. TANNER,

Petitioners,

v.

MICHAEL EUGENE SPEARS, MICHAEL SPEARS, P.A., GEDNEY M. HOWE, III, GEDNEY M. HOWE, III, P.A., RICHARD A. HARPOOTLIAN, RICHARD A. HARPOOTIAN, P.A., A. CAMDEN LEWIS, AND LEWIS & BABOCK, LLP,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondents' Brief in Opposition ("BIO") ultimately underscores the need for this Court to take up the important public policy question of whether 18 U.S.C. § 2721(b)(4), referred to in the interest of brevity as the "litigation exception" to the Driver's Privacy Protection Act of 1994 ("DPPA" or "the Act"), allows lawyers to solicit clients, as the Fourth Circuit held below. Significantly, the BIO's own "Conclusion" does not even oppose this Court's review in so many words, stating instead that "[e]ven if this Court grants *certiorari* and vacates the Fourth Circuit's decision, numerous additional statutory and constitutional issues will remain to be decided on summary judgment." BIO at 36. While it may be true that some other issues would remain outstanding if this Court were to vacate the Fourth Circuit's decision (as with most any other case previously disposed of on summary judgment), that is no reason for this Court to decline addressing the "lawyer solicitation" issue that the Fourth Circuit's decision has squarely framed, in clear conflict with decisions of the Third Circuit and other lower courts.

1. Notwithstanding The Brief In Opposition's Assertions To The Contrary (Which Simply Mirror Language From The Fourth Circuit's Opinion), There Is No Limiting Principle In The Fourth Circuit's Decision That Would Prohibit "Trolling" For Clients Under The Litigation Exception.

Rejecting Respondents' persistent protestations to the contrary, the Fourth Circuit clearly and unequivocally found (applying an objective standard) that Respondents had, indeed, engaged in "solicitation" of clients within the meaning of the Act, but then excused it on the basis that the solicitation was "inextricably intertwined" with litigation. App. 5a, 25a-29a.[1] The fundamental flaw in the Fourth Circuit's decision (apart from its lack of any footing in the statutory text)[2] is that it lacks any limiting principle. While purporting not to be "undertaking to lay down a rule applicable in all future cases," *see* App. 30a, the court's rationale plainly allows lawyers to obtain and use "personal information" (as the Act

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[1] It bears noting that the Fourth Circuit did not just confine itself to excusing Respondents' solicitations; later on in its opinion, the court affirmatively commended Respondents' conduct: "Put simply, they did what any good lawyer would have done; Congress could not possibly have intended to impose DPPA liability under such circumstances." App. 38a. Query why the same could not be said of any "good" purveyor of goods and services.

[2] The full text of the entire statute is set forth as Appendix F to the original Petition.

defines it)[3] to solicit clients, without limitation. Despite its disclaimer, the Fourth Circuit effectively adopted Respondents' unabashed position that "Congress intended for lawyers to have *unfettered* access and use of DMV information for use in litigation." *Cf.* App. 19a (quoting from Respondents' counterclaim in the district court) (emphasis added).

The Fourth Circuit ostensibly condemns using personal information to "troll[ ]" for clients, as if to suggest that "trolling" would constitute a violation of the DPPA. App. 35a n.13 (distinguishing *Wemhoff v. District of Columbia*, 887 A.2d 1004, 1011-12 (D.C. 2005)); App. 42a (observing that Respondents could not be said to have been merely "trolling" when they had "already been contacted by potential clients"). There is, however, nothing in the Fourth Circuit's reasoning that would effectively prohibit a lawyer's obtainment and use of DMV information to "troll" for

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[3] And in terms of elaborating upon the invasion of privacy that the Fourth Circuit's decision allows, it bears emphasis that because soliciting lawyers would be operating under the aegis of the litigation exception, they would have access to what the statute defines as "highly restricted personal information," which, above and beyond "personal information," includes "medical or disability information" about a driver. *Compare* 18 U.S.C. § 2721(a)(2) (identifying the limited statutory exceptions that allow access to "highly restricted personal information") *with* 18 U.S.C. § 2725(3)-(4) (defining the terms "personal information" and "highly restricted personal information"). At the risk of belaboring the obvious, lawyer access to such otherwise confidential information substantially expands the universe of potential clients and claims.

clients. To the extent the court is suggesting that a lawyer's contact by a "potential client" constitutes an essential prerequisite to then invoking the litigation exception to solicit clients based upon DMV information (and thereby avoid the charge of "trolling"), that is no meaningful limitation at all. (Moreover, all an unscrupulous lawyer would have to do is simply say that he or she had been contacted by a "potential client," an assertion that would be, as a practical matter, completely unverifiable.)[4]

2. There Is An Undeniable Conflict Between The Fourth Circuit And The Third Circuit (As Well As Other Lower Courts) As To Whether The Litigation Exception Allows Lawyer Solicitation Of Clients.

The Third Circuit got it right in *Pichler v. UNITE*, 542 F.3d 380, 395-96 (3d Cir. 2008) (*Pichler V*), and *Pichler v. UNITE*, 585 F.3d 741, 751-53 (3d Cir. 2009) (*Pichler VII*), as had the district court before it. *See Pichler v. UNITE*, 446 F. Supp. 2d 353,

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[4] Elsewhere in its opinion, the court actually seems to acknowledge, at least implicitly, that prior contact by a potential client is not a threshold requirement. *See* App. 3a-4a (reciting without qualification that Respondents used "personal information" to identify potential named plaintiffs in the "Dealer Act group action"); App. 26a (referring to Petitioners' contention that the solicitation letters that Respondents generated from the personal information they obtained from the DMV accomplished the aim of finding "potential named plaintiffs" for the same litigation, and taking no exception to this characterization).

368-70 (E.D. Pa. 2006) (*Pichler III*). The DPPA's litigation exception does not embody a "lawyer exception" to the Act's prohibition in 18 U.S.C. § 2721(b)(12) against solicitation derived from personal information (absent a recipient's prior "express consent").[5]

The other lower court decisions cited in the Petition are in agreement. *See Manso v. Santamarina & Assocs.*, No. 1:04-cv-10276, 2005 WL 975854 (S.D.N.Y. 2005); *Wemhoff v. District of Columbia, supra*, 887 A.2d at 1010-12; *Young v. West Publ'g Corp.*, 724 F. Supp. 2d 1268, 1279 n.4 (S.D. Fla. 2010) (quoting *Pichler VII, supra,* 585 F.3d at 752).

In their BIO, Respondents quite appropriately direct the Court's attention to the First Circuit's recent decision in *Downing v. Globe Direct LLC*, 682 F.3d 18 (1st Cir. 2012), which held that on the facts of that case, the inclusion of advertising material in automobile registration renewal notices issued by a vendor that had contracted with the State for that very purpose fell within the "government function" exception of 18 U.S.C. § 2721(b)(1). This was especially so because the contract with the vendor actually

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[5] The Fourth Circuit's opinion is notable for its complete lack of any reference at all to *Pichler VII*, in which the Third Circuit made it most emphatically clear that, in its view, the DPPA does not allow the use of personal information to identify potential litigants. *See* 585 F.3d at 751-55. In this connection, it bears mention that the panels in *Pichler V* and *Pichler VII* were completely different, *viz.*, there was no overlap in judges at all. Accordingly, the Fourth Circuit's parting of the ways with the Third Circuit is even greater than appears at first blush.

called for it to sell advertising for the purpose of raising revenue for the Massachusetts Registry of Motor Vehicles ("RMV"), but prohibited the vendor from any further disclosure of the drivers' personal information (including to the advertisers themselves). *See id.* at 20, 24-25.

The *Downing* court's holding was distilled as follows:

> The fact that no one other than the RMV and its contractor, Globe Direct, ever possesses the personal information, combined with the integrated goals of the program, including mailing the renewal notices as well as cutting the costs of and raising revenue for RMV programs, leaves us convinced that the program is a permissible government function under subsection (b)(1). And because the program is a permissible means for the use of personal information, Globe Direct cannot be liable.

Id. at 25.

The court quoted in passing from the Fourth Circuit's decision below, *see id.* at 24,[6] but *Downing* was an unremarkable application of the "government

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[6] "Because the solicitation was entirely consistent with state law, was integral to, and was, indeed, inextricably intertwined with the defendants' permissible use of the Buyers' personal information pursuant to the litigation exception, the Buyers' claim fails as a matter of law." *Id.* (quoting *Maracich v. Spears*, 675 F.3d 281, 293-94 (4th Cir. 2012)).

function" exception in section 2721(b)(1). It is also materially indistinguishable (factually and legally) from the Eleventh Circuit's earlier, equally unremarkable application of the same exception in *Rine v. Imagitas, Inc.*, 590 F.3d 1215 (11th Cir. 2009). Neither case informs the resolution of the "lawyer solicitation" issue framed by subsection 2721(b)(4) that this case presents.

In terms of contributing to the division of authority among the courts of appeal that we believe meets the criteria of Rule 10(a) of this Court, however, it is somewhat significant that the First Circuit was unpersuaded by the appellant's invocation of the Third Circuit's "finding" in *Pichler V* that "the DPPA contains no language that would excuse an impermissible use [union organizing] merely because it was executed in conjunction with a permissible purpose [referring to the *Pichler* defendant's attempted but misplaced invocation of the litigation exception]." *Id.* at 23 (quoting *Pichler V, supra*, 542 F.3d at 395). In other words, to the extent that the *Downing* court endorsed the Fourth Circuit's position over the Third's, the First Circuit has actually contributed to the circuit split.

3. While It Does Not Speak To The Issue In This Case Or Give Rise To Any Other Division Of Authority, The Seventh Circuit's Very Recent (And Deeply Divided) En Banc Decision In *Senne v. Village Of Palatine* Provides Another Compelling Example Of Why This Court Needs To Bring Greater Clarity To The DPPA's Litigation Exception.

Finally, and while it will probably be the subject of its own certiorari petition shortly, the Seventh Circuit's very recent en banc decision in *Senne v. Village of Palatine*, No. 10-3243, 2012 U.S. App. LEXIS 16328 (7th Cir. Aug. 6, 2012),[7] further illustrates the need for this Court's guidance in interpreting the DPPA, most particularly the litigation exception. To have generated an en banc decision by the Seventh Circuit, *Senne's* origins could hardly have been more mundane. It arose from the placement of a parking citation on the windshield of the plaintiff's car on a public way. In keeping with the routine procedure of the Village's police department, the citation disclosed "personal information" that the ticketing officer had obtained from the Illinois DMV, specifically, Senne's full name, address, driver's license number, date of birth, sex, height, and weight. 2012 U.S. App. LEXIS

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[7] By sheer coincidence, the release date of the *Senne* opinion was the same as the filing deadline for the BIO, which obviously made it impossible for Respondents to direct the Court's attention to *Senne*.

16328, at *1-*4. Senne then brought a putative class action against the Village under the DPPA, contending that this "disclosure" of his personal information (and, by extension, the personal information of all others similarly situated) constituted a violation of the Act. *See id.* at *5.

The Village responded with a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., which the district court summarily granted, concluding that there had been no "disclosure" within the meaning of the statute in the first instance. *Id.* at *5-*6. A divided Seventh Circuit panel initially affirmed, *see* 645 F.3d 919 (7th Cir. 2011), but then the full court granted en banc review, which resulted in a reversal. The en banc decision, however, generated not only a majority opinion (by Judge Ripple, the panel's dissenter), but also two different dissenting opinions, one authored by Judge Posner and the other by Judge Flaum (in which Judge Posner also joined).

The Village argued that the parking ticket was not a "disclosure," but even if was, it satisfied either the "government function" exception (18 U.S.C. § 2721(b)(1)) or, as here, the litigation exception (18 U.S.C. § 2721(b)(4), specifically in that the citation constituted "service of process," which was undisputed). The Seventh Circuit majority found that the citation was a disclosure, but then, having focused on the recurring "for use" requirement in the "permissible uses" section of the statute (section

2721(b)), Judge Ripple questioned whether the personal information that the citation contained was actually "used" to effectuate what was undeniably a function of the Village's police department (i.e., issuing citations) or the service of process. *See* 2012 U.S. App. LEXIS at *27-*29. If not, a violation had occurred, but the resolution of this "use" issue required further proceedings. *Id.* at *29. Consequently, at least within the context of a Rule 12(b)(6) motion, the majority held that Senne had articulated a "plausible claim that the Village's actions failed to fulfill its statutory duties," and it reversed and remanded the district court's dismissal. *Id.* at *31.

Judge Posner's brief dissent argued, in substance, that the "litigation exception" applied by its terms, essentially because the citation constituted "service of process" in an "administrative proceeding" in a "local court." *See id.* at *33-*34. He concluded, somewhat ruefully, that under the majority's interpretation of the statute (unless reversed by this Court), "only a sucker would park legally in the Village of Palatine." *Id.* at *40.

Judge Flaum's much lengthier dissent turned on his view that while the parking citation did constitute a "disclosure" within the meaning of the Act, it was a permissible use of the "personal information" under the litigation exception. He focused on, and rejected, the majority's narrow view of the "for use" statutory language. *See id.* at *40-*55.

For present purposes, there is no reason to further expound upon the majority and dissenting opinions in *Senne*. The point is that while it is far afield from the "lawyer solicitation" issue that this case presents under the litigation exception, *Senne* amply illustrates the struggles that the lower courts have faced and will continue to face in construing the DPPA, particularly its litigation exception.

CONCLUSION

In its opinion, the Fourth Circuit referred to the "manifest tension between the solicitation and litigation exceptions under the DPPA" and to the "state of continued evolution" in the circuit courts concerning "the permissible use provisions of the DPPA." Petitioners contend that this Court should exercise its jurisdiction to relieve the perceived "manifest tension" between these two exceptions as they relate to lawyer solicitation based upon the obtainment and use of "personal information" within the meaning of the Act and that, in any event, any "continued evolution" into the allowance of such solicitation (which the Fourth Circuit has now sanctioned and which any other court persuaded by its opinion would permit) should be stopped, which is solely within this Court's

power. Accordingly, the Court should grant the Petition.

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JOINT APPENDIX

RECORD AND BRIEF

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No. 12-25

IN THE

Supreme Court of the United States

EDWARD F. MARACICH *et al.*,
Petitioners,

v.

MICHAEL EUGENE SPEARS *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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November 9, 2012

PETITION FOR CERTIORARI FILED JULY 2, 2012
CERTIORARI GRANTED SEPTEMBER 25, 2012

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NOTICE

The following documents have been omitted from the printing of this Joint Appendix. They may be found in the Petitioners' Appendix to the 12-25 Petition For A Writ Of Certiorari at the following pages:

Maracich v. *Spears*, 675 F.3d 281 (4th Cir. 2012) 1a

Maracich v. *Spears*, No. 10-2021 (4th Cir. Apr. 4, 2012) (judgment) 45a

Maracich v. *Spears*, No. 7:09-cv-01651-HMH (D.S.C. Aug. 4, 2010) (opinion and order)..... 47a

Maracich v. *Spears*, No. 7:09-cv-01651-HMH (D.S.C. Aug. 4, 2010) (summary judgment)..... 85a

Maracich v. *Spears*, No. 7:09-cv-01651-HMH (D.S.C. Aug. 8, 2010) (opinion and order)..... 86a

U.S. DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
(SPARTANBURG)

[Date Filed 06/23/2009]

Civil Docket for Case #: 7:09-cv-01651-HMH

MARACICH *et al*

v.

SPEARS *et al*

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
06/23/2009	1	COMPLAINT against all defendants (Filing fee $ 350 receipt number 2157242.), filed by Edward F Maracich, Martha L Weeks, John C Tanner. (Attachments: # 1 Exhibit A Harpootlian June 23, 2006 Letter, # 2 Exhibit B Harpootlian August 24, 2006 Letter, # 3 Exhibit C Harpootlian October 20, 2006 Letter, # 4 Exhibit D Harpootlian January 19, 2007 letter, # 5 Exhibit E Harpootlian January 22, 2007 letter, # 6 Exhibit F Harpootlian January 23, 2007 Letter, #7 Exhibit G Thomas January 9, 2007 Letter, # 8 Exhibit H Lewis January 23, 2007 letter, # 9 Exhibit I Lewis March 1, 2007, # 10 Exhibit J Lewis March 5, 2007

DATE	NO.	PROCEEDINGS
		letter, # 11 Exhibit K Harpootlian May 8, 2007, # 12 Exhibit L Studemeyer March 7, 2007 letter, # 13 Exhibit M Lewis February 16, 2007 letter) (awil) (Entered: 06/23/2009)
		* * * *
08/03/2009	36	MOTION to Dismiss *Class Action Complaint for Violation of the Driver's Privacy Act* by Gedney M Howe III PA, Richard A Harpootlian, Richard A Harpootlian PA, A Camden Lewis, Lewis & Babcock LLP, Michael Eugene Spears, Michael Spears PA, Gedney M Howe, III. Response to Motion due by 8/21/2009 No proposed order (Daniel, Edward) Modified on 8/4/2009. Additional attachments filed 8/3/09 as entry 37 (awil). Modified on 9/1/2009. Additional attachments filed 8/31/09 as entry 40 (awil). (Entered: 08/03/2009)
08/03/2009	37	Additional Attachments to Main Document 36 MOTION to Dismiss *Class Action Complaint for Violation of the Driver's Privacy Act Memorandum in Support of Defendants' Motion to Dismiss Class Action Complaint for Violation of Driver's Privacy Protection Act.* (Attachments: # 1 Table of Exhibits, # 2 Exhibit A- Car Buyers' Complaint,

DATE	NO.	PROCEEDINGS
		Herron, # 3 Exhibit B- Car Dealers' Motion for Change of Venue, to Dismiss, and for Protective Order, Herron, # 4 Exhibit C-1 Car Buyers' Amended Complaint, Herron, # 5 Exhibit C-2 Car Buyers' Amended Complaint, Herron, # 6 Exhibit C-3 Car Buyers' Amended Complaint, Herron, #7 Exhibit C-4 Car Buyers' Amended Complaint, Herron, # 8 Exhibit C-5 Car Buyers' Amended Complaint, Herron, # 9 Exhibit C-6 Car Buyers' Amended Complaint, Herron, # 10 Exhibit D- Car Dealers' Motion to Dismiss and for Protective Order, Herron, #11 Exhibit E-Joint Memorandum in Support of Car Dealers' Motion to Dismiss, Herron, # 12 Exhibit F-1 Car Buyers' Memorandum in Opposition to Motions to Dismiss, Herron, # 13 Exhibit F-2 Car Buyers' Memorandum in Opposition to Motions to Dismiss, Herron, # 14 Exhibit F-3 Car Buyers' Memorandum in Opposition to Motions to Dismiss, Herron, # 15 Exhibit F-4 Car Buyers' Memorandum in Opposition to Motions to Dismiss, Herron, # 16 Exhibit G-Transcript of Hearing, April 4, 2007, Herron, # 17 Exhibit H- Car Buyers' Second Amended Complaint, Herron, # 18 Exhibit I-1 Car Dealers' Memorandum in Oppo-

DATE	NO.	PROCEEDINGS
		sition to Car Buyers' Motion to Amend, Herron, #19; Exhibit I-1 Car Dealers' Memorandum in Opposition to Car Buyers' Motion to Amend, Herron, # 20 Exhibit I-3 Car Dealers' Memorandum in Opposition to Car Buyers' Motion to Amend, Herron, # 21 Exhibit J- Car Dealers' Return to Car Buyers' Motion to Amend, Herron, # 22 Exhibit K- Car Buyers' Memorandum in Support of Motion to Amend, Herron, # 23 Exhibit L- Order, July 31, 2007, Herron, # 24 Exhibit M- Transcript of Hearing, July 31, 2007, Herron, # 25 Exhibit N- Order, August 21, 2007, Herron, # 26 Exhibit O- Order, January 31, 2008, Herron, # 27 Exhibit P- Exhibit I to the Complaint with language required by Rule 7.3 highlighted, # 28 Exhibit Q-Demand for Preservation of Electronically Stored Information, July 23, 2009, # 29 Exhibit R- South Carolina Department of Motor Vehicles, For Attorneys, Freedom of Information Act, www.scdmvonline.com) (Daniel, Edward) (Entered: 08/03/2009)
08/21/2009	38	RESPONSE in Opposition re 36 MOTION to Dismiss *Class Action Complaint for Violation of the Driver's Privacy Act* Response filed by Edward F Maracich, Martha

DATE	NO.	PROCEEDINGS
		L Weeks, John C Tanner. Reply to Response to Motion due by 8/31/2009 (Attachments: #1 Exhibit Thomas Custom and Practice letter, # 2 Appendix Wall v. Sumter-Lee, # 3 Appendix Rahman v. Smith, #4 Appendix In re Imagitas, # 5 Appendix Donaldson v. City) (Studemeyer, Joseph) (Entered: 08/21/2009)
08/31/2009	39	RESPONSE in Support re 36 MOTION to Dismiss *Class Action Complaint for Violation of the Driver's Privacy Act* Response filed by Gedney M Howe III PA, Richard A Harpootlian, Gedney M Howe, III, A Camden Lewis, Lewis & Babcock LLP, Michael Spears PA, Richard A Harpootlian PA, Michael Eugene Spears. (Attachments: # 1 Table of Exhibits, # 2 S- Letter dated 3/18/02 between Pathman Lewis and Hartz law firms, filed 8/7/06, # 3; T- Letter dated 3/21/02 between Pathman Lewis and Hartz law firms, filed 8/7/06, # 4 U- Corrected Order, filed 11/7/06, # 5 V- Letter dated 3/14/03, attached to Defendants' Reply in Support of Motion for Summary Judgement, filed 7/14/06, # 6 W- SC CMV Report for Driver Information, Form MV-70, # 7 X- Plaintiffs Fed.R.Civ.P.26 Initial Disclosures, filed 9/16/03, # 8 Y-Wemhoff Complaint, p.1, #9 Table of Unreported

DATE	NO.	PROCEEDINGS
		Cases, # 10 Unreported Cases- Part 1, # 11 Unreported Cases- Part 2, # 12 Unreported Cases- Part 3, # 13 Unreported Cases- Part 4) (Daniel, Edward) (Entered: 08/31/2009)
08/31/2009	40	Additional Attachments to Main Document 36 MOTION to Dismiss *Class Action Complaint for Violation of the Driver's Privacy Act.* (Attachments: # 1 Table of Unreported Cases) (Daniel, Edward) (Entered: 08/31/2009)
09/08/2009	41	ORDER denying 36 Motion to Dismiss. Signed by Honorable Henry M Herlong, Jr on 9/8/09.(awil) (Entered: 09/08/2009)
09/18/2009	42	ANSWER to 1 Complaint, COUNTERCLAIM against Edward F Maracich, John C Tanner, Martha L Weeks by Richard A Harpootlian, Michael Eugene Spears, Gedney M Howe, III, Richard A Harpootlian PA, Lewis & Babcock LLP, Michael Spears PA, Gedney M Howe III PA, A Camden Lewis. (Attachments: #1 Exhibit List, # 2 Exhibit A-Internet Print Out, # 3 Exhibit B-Herron Complaint) (Cooke, Morris) Modified on 9/21/2009 to edit text. Additional attachments filed 9/18/09 as entry 43 and 44 (awil). (Entered: 09/18/2009)

DATE	NO.	PROCEEDINGS
09/18/2009	43	Additional Attachments to Main Document 42 Answer to Complaint and counterclaim. (Attachments: #1 Exhibit C-1-Amd Complaint, #2 Exhibit C-2-Amd Complaint, # 3 Exhibit C-3-Amd Complaint, # 4 Exhibit C-4-And Complaint, # 5 Exhibit C-5-Amd Complaint, # 6 Exhibit D-Mtn for Change of Venue, # 7 Exhibit E-Mtn to Dismiss) (Cooke, Morris) Modified on 9/21/2009 to link correct event to associated event (awil). (Entered: 09/18/2009)
09/18/2009	44	Additional Attachments to Main Document 42 Answer to Complaint, Counterclaim. (Attachments: # 1 Exhibit F1-Memo Opp MTD, # 2 Exhibit F2-Memo Opp MTD, # 3 Exhibit G-Transcript, 4-4-07 Hrg, #4 Exhibit H- Memo Supp MTD, # 5 Exhibit H2-Memo Supp MTD, #6 Exhibit I-Order, 8-21-07, # 7 Exhibit J-Order, 7-31-07, # 8 Exhibit K-Order, 1-31-08) (Cooke, Morris) (Entered: 09/18/2009)
		* * * *
10/08/2009	47	ANSWER to Counterclaim 42 by Edward F Maracich, John C Tanner, Martha L Weeks. (Studemeyer, Joseph) (Entered: 10/08/2009)
		* * * *

DATE	NO.	PROCEEDINGS
01/11/2010	55	MOTION to Stay by Gedney M Howe III PA, Richard A Harpootlian, Gedney M Howe, III, A Camden Lewis, Lewis & Babcock LLP, Michael Spears PA, Richard A Harpootlian PA, Michael Eugene Spears. Response to Motion due by 1/28/2010 (Attachments: # 1 Exhibit Documents from Herron case, # 2 Exhibit Collins Case) No proposed order (Daniel, Edward) Modified on 1/12/2010 to edit exhibit descriptions (sfla). (Entered: 01/11/2010)
01/13/2010	56	RESPONSE in Opposition re 55 MOTION to Stay Response filed by Edward F Maracich, John C Tanner, Martha L Weeks. Reply to Response to Motion, due by 1/25/2010 (Attachments: # 1 Appendix SunTrust v. Busby) (Studemeyer, Joseph) (Entered: 01/13/2010)
01/25/2010	57	REPLY TO RESPONSE to motion re 55 MOTION to Stay Response filed by Gedney M Howe III PA, Richard A Harpootlian, Gedney M Howe, III, A Camden Lewis, Lewis & Babcock LLP, Michael Spears PA, Richard A Harpootlian PA, Michael Eugene Spears. (Daniel, Edward) Modified on 1/26/2010 to edit text for clarification (sfla). (Entered: 01/25/2010)

DATE	NO.	PROCEEDINGS
01/25/2010	58	ORDER granting in part and denying in part 55 Motion to Stay. Signed by Honorable Henry M Herlong, Jr on 1/25/10. (awil) (Entered: 01/25/2010)
		* * * *
03/23/2010	66	ORDER denying 61 Motion to Lift Stay to file a motion for class certification; the stay is modified solely to allow the parties to file motions for summary judgment (due within 60 days of this order). Signed by Honorable Henry M Herlong, Jr on 3/23/10. (sfla) (Entered: 03/23/2010)
		* * * *
05/21/2010	68	MOTION for Partial Summary Judgment by Edward F Maracich, John C Tanner, Martha L Weeks. Response to Motion due by 6/7/2010 (Attachments: # 1 Memo in Support, # 2 Appendix Locate.plus v. Iowa DOT, # 3 Appendix Wemhoff v. D.C., #4 Appendix Thomas custom and practice letter) No proposed order (Studemeyer, Joseph) Modified on 5/25/2010: See additional attachments 69 and 70 (sfla). (Entered: 05/21/2010)
05/21/2010	69	Additional Attachments to Main Document 68 MOTION for Partial Summary Judgment *Index of Exhib-*

DATE	NO.	PROCEEDINGS
		its. (Attachments: # 1 Exhibit A - Harpootlian June 23, 2006 letter, # 2 Exhibit B - Harpootlian August 24, 2006 letter, # 3 Exhibit C - Herron Complaint, #4 Exhibit D - Harpootlian October 26, 2006 letter, # 5 Exhibit E - Herron First Amended Complaint, # 6 Exhibit F - Harpootlian January 19, 2007 letter, # 7 Exhibit G - Harpootlian January 22, 2007 letter, # 8 Exhibit H - Harpootlian January 23, 2007 letter, # 9 Exhibit I - March 5, 2007 solicitation letter) (Studemeyer, Joseph) (Entered: 05/21/2010)
05/21/2010	70	Additional Attachments to Main Document 68 MOTION for Partial Summary Judgment *Index of Exhibits.* (Attachments: # 1 Exhibit J - Studemeyer March 7, 2007 letter, # 2 Exhibit K - Lewis February 16, 2007 letter, # 3 Exhibit L - Herron motion to amend, #4 Exhibit M - Herron memo in support of motion, # 5 Exhibit N - Herron August 21, 2007 order, # 6 Exhibit O – Herron October 12, 2009 order) (Studemeyer, Joseph) (Entered: 05/21/2010)
105/21/2010	71	AFFIDAVIT of Barbara W. Hinson re 68 MOTION for Partial Summary Judgment by Edward F Maracich, John C Tanner, Martha L

DATE	NO.	PROCEEDINGS
		Weeks. (Attachments: # 1 Exhibit Pages SCODC000003-51, # 2 Exhibit Pages SCODC000052-75, # 3 Exhibit Pages SCODC000076-128, # 4 Exhibit Pages SCODC000129-248) (Studemeyer, Joseph) (Additional attachment(s) added on 5/24/ 2010: # 1 Affidavit of Records Custodian Barbara Hinson, # 2 Exhibit Pages SCODC000003-51, # 3 Exhibit Pages SCODC000052-75, #4 Exhibit Pages SCODC000076-128, # 5 Exhibit Pages SCODC000129-248) Modified on 5/24/2010 to replace main document with corrected signature as provided by filing user and to re-attach all other documents (sfla). Modified on 5/25/2010: See additional attachments 72 and 73 (sfla). (Entered: 05/21/2010)
05/21/2010	72	Additional Attachments to Main Document 71 Affidavit, 68 MOTION for Partial Summary Judgment *Affidavit of Barbara W. Hinson*. (Attachments: # 1 Exhibit Pages SCODC000249-368, #2 Exhibit Pages SCODC000369-489) (Studemeyer, Joseph) Modified on 5/24/ 2010: contacted counsel in re page 35 of 121 for attachment #2 - this is the most legible document they have (sfla). (Entered: 05/21/2010)

DATE	NO.	PROCEEDINGS
05/21/2010	73	Additional Attachments to Main Document 71 Affidavit, 68 MOTION for Partial Summary Judgment *Affidavit of Barbara W. Hinson.* (Attachments: # 1 Exhibit Pages SCODC000490-582, # 2 Exhibit Pages SCODC000583-723) (Studemeyer, Joseph) (Entered: 05/21/2010)
05/21/2010	74	DECLARATION *of Edward F Maracich* by Edward F Maracich, John C Tanner, Martha L Weeks re 68 MOTION for Partial Summary Judgment. (Studemeyer, Joseph) (Additional attachment(s) added on 5/24/2010: # 1 Affidavit Declaration of Edward F. Maracich) Modified on 5/24/2010 to replace document with corrected signature as provided by filing user (sfla). (Entered: 05/21/2010)
05/21/2010	75	DECLARATION *of John C Tanner* by Edward F Maracich, John C Tanner, Martha L Weeks re 68 MOTION for Partial Summary Judgment. (Studemeyer, Joseph) (Additional attachment(s) added on 5/24/2010: # 1; Affidavit of John C Tanner) Modified on 5/24/2010 to replace document with corrected signature as provided by filing user (sfla). (Entered: 05/21/2010)

DATE	NO.	PROCEEDINGS
05/21/2010	76	DECLARATION *of Martha L. Weeks* by Edward F Maracich, John C Tanner, Martha L Weeks re 68 MOTION for Partial Summary Judgment. (Studemeyer, Joseph) (Additional attachment(s) added on 5/24/2010: # 1 Affidavit of Martha L Weeks) Modified on 5/24/2010 to replace document with corrected signature as provided by filing user (sfla). (Entered: 05/21/2010)
05/24/2010	77	MOTION for Summary Judgment by Gedney M Howe III PA, Richard A Harpootlian, Gedney M Howe, III, A Camden Lewis, Lewis & Babcock LLP, Michael Spears PA, Richard A Harpootlian PA, Michael Eugene Spears. Response to Motion due by 6/10/2010 (Attachments: # 1 Memorandum in Support of Defendants' Motion for Summary Judgment, # 2 Exhibit A - Car Buyers' Complaint, Herron, # 3 Exhibit B - Car Dealers' MT for Change of Venue, to Dismiss and for Protective Order, Herron, # 4 Exhibit C-1 - Car Buyers' Amended Complaint, Herron, # 5 Exhibit C-2 - Car Buyers' Amended Complaint, Herron, # 6 Exhibit C-3 - Car Buyers' Amended Complaint, Herron, # 7 Exhibit C-4 - Car Buyers' Amended Complaint, Herron, # 8 Exhibit C-5 - Car Buyers' Amended Complaint, Herron, # 9

DATE	NO.	PROCEEDINGS
		Exhibit C-6 - Car Buyers' Amended Complaint, Herron, # 10 Exhibit D - Car Dealers' MT to Dismiss and for Protective Order, Herron, # 11 Exhibit E - Joint Memo in Support of Car Dealers' Motion to Dismiss, Herron, # 12 Exhibit F-1 - Car Buyers' Memo in Opposition to MT to Dismiss, Herron, # 13 Exhibit F-2 - Car Buyers' Memo in Opposition to MT to Dismiss, Herron, # 14 Exhibit F-3 - Car Buyers' Memo in Opposition to MT to Dismiss, Herron, # 15 Exhibit F-4 - Car Buyers' Memo in Opposition to MT to Dismiss, Herron) No proposed order (White, John) Modified on 5/24/2010 to remove redundant designations for Exhibits (sfla). Modified on 5/25/2010: See additional attachments 78 and 79 (sfla). Modified on 5/25/2010 to correct event type as requested by filing user (sfla). (Entered: 05/24/2010)
05/24/2010	78	Additional Attachments to Main Document 77 MOTION for Summary Judgment. (Attachments: # 1 Exhibit G - Transcript of Hearing, April 4, 2007, Herron, # 2 Exhibit H - Car Buyers' Second Amended Complaint, Herron., # 3 Exhibit I-1 - Car Dealers' Memo in Opposition to Car Buyers' Mt to Amend, Herron, # 4 Exhibit I-2- Car Dealers' Memo in

DATE	NO.	PROCEEDINGS
		Opposition to Car Buyers' Mt to Amend, Herron, # 5 Exhibit I-3- Car Dealers' Memo in Opposition to Car Buyers' Mt to Amend, Herron, # 6 Exhibit J - Car Dealers' Return to Car Buyers' Motion to Amend, Herron (Filed by Studemeyer), # 7 Exhibit K - Car Buyrs' Memorandum in Support of Motion to Amend, Herron, # 8 Exhibit L - Order, July 31, 2007, Herron, #9 Exhibit M - Transcript of Hearing, July 31, 2007, Herron, # 10 Exhibit N - Order, August 21, 2007, Herron, # 11 Exhibit O - Order, January 31, 2008, Herron) (White, John) Modified on 5/24/2010 to remove redundant designations for Exhibits ((sfla). Modified on 5/25/2010 to indicate correction to event type as requested by filing user (sfla). (Entered: 05/24/2010)
05/24/2010	79	Additional Attachments to Main Document 77 MOTION for Summary Judgment. (Attachments: # 1 Exhibit P - Exhibit I to the Complaint with language required by Rule 7.3 Highlighted, # 2 Exhibit Q - Demand for Preservation of Electronically Stored Information, July 23, 2009 (issued by Studemeyer to Def. Att., # 3 Exhibit R - SC Dept. of Motor Vehicles, For Attorneys, Freedom of Information Act, www.

DATE	NO.	PROCEEDINGS
		scdmvonline.com, # 4 Exhibit S - Order on Mt to Dismiss & Substitute as to Toyota of Greenville, Inc., filed October 12, 2009, # 5 Exhibit T - Order Denying Mt to Compel Arbitration, Dated March 10, 2008, # 6 Exhibit U - Supreme Court Decision on Arbitration, # 7 Exhibit V - January 11, 2010 Order on Declaratory Judgment, # 8 Exhibit W - Unpublished and Out of Region Cases) (White, John), Modified on 5/25/2010 to indicate correction to event type as requested by filing user (sfla). Modified on 5/25/2010 to remove redundancies; NEF not regenerated (sfla). (Entered: 05/24/2010)
		* * * *
06/07/2010	81	RESPONSE in Opposition re 68 MOTION for Partial Summary Judgment *Memorandum* Response filed by Gedney M Howe III PA, Richard A Harpootlian, Gedney M Howe, III, A Camden Lewis, Lewis & Babcock LLP, Michael Spears PA, Richard A Harpootlian PA, Michael Eugene Spears. Reply to Response to Motion due by 6/17/2010 (Attachments: # 1 Exhibit Statement of Disputed Facts, # 2 Exhibit Wemhoff Complaint, # 3 Exhibit Thomas Corrected Order, # 4 Ex-

DATE	NO.	PROCEEDINGS
		hibit Thomas Marketing Letter, # 5 Exhibit Brigmann Case, #6 Exhibit Shadwell Case, # 7 Exhibit Wemhoff Case, # 8 Exhibit Manson Case, # 9 Exhibit Avon Case) (Daniel, Edward) (Entered: 06/07/2010)
		* * * *
06/10/2010	83	RESPONSE in Opposition re 77 MOTION for Summary Judgment Response filed by Edward F Maracich, John C Tanner, Martha L Weeks. Reply to Response to Motion due by 6/21/2010 (Compton, Gary) Modified on 6/11/2010: See Additional Attachments to Main Document 84 (sfla). (Entered: 06/10/2010)
06/10/2010	84	Additional Attachments to Main Document 83 Response in Opposition to Motion. (Attachments: # 1 Appendix Thomas Reply Part 1, #2 Appendix Thomas Reply Part 2, # 3 Appendix Thomas Reply Part 3, # 4 Appendix Excerpt from Hearing, # 5 Appendix Manso v. Santamarina, # 6 Appendix Wemhoff v. D.C., #7 Appendix Locate.Plus v. Iowa DOT) (Compton, Gary) (Entered: 06/10/2010)
06/10/2010	85	AFFIDAVIT of Philip N. Elbert re 83 Response in Opposition to Motion by Edward F Maracich,

DATE	NO.	PROCEEDINGS
		John C Tanner, Martha L Weeks. (Attachments: # 1 Affidavit) (Compton, Gary) (Entered: 06/10/2010)
06/10/2010	86	DECLARATION by Edward F Maracich, John C Tanner, Martha L Weeks re 83 Response in Opposition to Motion. (Attachments: # 1 Supplemental Declaration) (Compton, Gary) (Entered: 06/10/2010)
		* * * *
06/17/2010	90	REPLY to Response to Motion re 68 MOTION for Partial Summary Judgment Response filed by Edward F Maracich, John C Tanner, Martha L Weeks. (Attachments: # 1 Appendix Excerpts from Congressional Record), (Compton, Gary) (Entered: 06/17/2010)
06/21/2010	91	REPLY to Response to Motion re 77 MOTION for Summary Judgment; Response filed by Gedney M Howe III PA, Richard A Harpootlian, Gedney M Howe, III, A Camden Lewis, Lewis & Babcock LLP, Michael Spears PA, Richard A Harpootlian PA, Michael Eugene Spears. (Attachments: # 1 Exhibit A-Larch Case, # 2 Exhibit B-Wemhoff Case) (White, John) (Entered: 06/21/2010)
		* * * *

DATE	NO.	PROCEEDINGS
08/04/2010	96	ORDER denying 68 Motion for Partial Summary Judgment; granting in part 77 Motion for Summary Judgment; terminating as moot 94 Motion to Stay. Signed by Honorable Henry M Herlong, Jr on 8/4/10. (sfla) (Entered: 08/04/2010)
08/04/2010	97	SUMMARY JUDGMENT in favor of Defendants against Plaintiffs (sfla) (Entered: 08/04/2010).
		* * * *
09/01/2010	100	NOTICE OF APPEAL re 66 Order on Motion to Lift Stay, 96 Order on Motion for Partial Summary Judgment, Order on Motion for Summary Judgment, Order on Motion to Stay, 58 Order on Motion to Stay - Filing fee $ 455, receipt number 0420-2920997. The Docketing Statement form, Transcript Order form and CJA 24 form may be obtained from the Fourth Circuit website at www.ca4.uscourts.gov (Compton, Gary) (Entered: 09/01/2010)
09/02/2010	101	Transmittal Sheet for Notice of Appeal to USCA re 100 Notice of Appeal, The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified the copy of the docket entries. (sfla) (Entered: 09/02/2010)

DATE	NO.	PROCEEDINGS
04/04/2012	103	USCA OPINION for 100 Notice of Appeal, filed by Edward F Maracich, John C Tanner, Martha L Weeks AFFIRMING the District Court. (sfla) (Entered: 04/04/2012)
04/26/2012	104	USCA MANDATE and JUDGMENT as to 100 Notice of Appeal, filed by Edward F Maracich, John C Tanner, Martha L Weeks (Attachments: # 1 4CCA Judgment) (sfla) (Entered: 04/26/2012)

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Court of Appeals Docket #: 10-2021
Docketed: 09/08/2010

EDWARD F. MARACICH, individually and on behalf of all others similarly situated; MARTHA L. WEEKS, individually and on behalf of all others similarly situated; JOHN C. TANNER, individually and on behalf of all others similarly situated

Plaintiffs - Appellants

v.

MICHAEL EUGENE SPEARS; MICHAEL SPEARS, PA; GEDNEY MAIN HOWE, III; GEDNEY MAIN HOWE, III, PA; RICHARD A. HARPOOTLIAN; RICHARD A. HARPOOTLIAN, PA; A. CAMDEN LEWIS; LEWIS & BABCOCK, LLP

Defendants - Appellees

DOCKET ENTRIES

DATE	#	DOCKET TEXT
09/08/2010	1	Case docketed. Originating case number: 7:09-cv-01651-HMH. Case manager: R Warren. Date notice of appeal filed: 09/01/2010 [10-2021] (RW)
09/08/2010	2	DOCKETING NOTICE issued. Re: [1], case docketed Initial forms due within 14 days. Originating case

DATE	#	DOCKET TEXT
		number: 7:09-cv-01651-HMH. [10-2021] (RW)
09/21/2010	3	Returned mail received from Appellants Edward F. Maracich, John C. Tanner and Martha L. Weeks re. [998429771] [10-2021] (RW)
09/21/2010	4	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by John B. White, Jr. for A. Camden Lewis and Lewis & Babcock. [998430028] [10-2021] John White
09/21/2010	5	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Appellee A. Camden Lewis. Was any question on Disclosure Form answered yes? No [998430036] [10-2021] John White
09/21/2010	6	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Appellee Lewis & Babcock. Was any question on Disclosure Form answered yes? No [998430043] [10-2021] John White
09/21/2010	7	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) for Richard A. Harpootlian and Richard A. Harpootlian. [998430110] [10-2021] Charles Hill
09/21/2010	8	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Appellee Richard A. Harpootlian. Was any question on

DATE	#	DOCKET TEXT
		Disclosure Form answered yes? No [998430115] [10-2021] Charles Hill
09/21/2010	9	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Appellee Richard A. Harpootlian. Was any question on Disclosure Form answered yes? No [998430119] [10-2021] Charles Hill
09/22/2010	10	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Matthew G. Gerrald for Michael Spears and Michael Eugene Spears. [998430222] [10-2021] Matthew Gerrald
09/22/2010	11	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Curtis W. Dowling for Michael Spears and Michael Eugene Spears. [998430229] [10-2021] Curtis Dowling
09/22/2010	12	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Appellee Michael Eugene Spears. Was any question on Disclosure Form answered yes? No [998430236] [10-2021] Curtis Dowling
09/22/2010	13	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Appellee Michael Spears. Was any question on Disclosure Form answered yes? No [998430239] [10-2021] Curtis Dowling

DATE	#	DOCKET TEXT
09/22/2010	14	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by E. Bart Daniel for Gedney Main Howe, III and Gedney Main Howe, III. [998430543] [10-2021] Edward Daniel
09/22/2010	15	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Appellees Gedney Main Howe, III and Gedney Main Howe, III. Was any question on Disclosure Form answered yes? No [998430546] [10-2021] Edward Daniel
09/22/2010	16	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Appellees Gedney Main Howe, III and Gedney Main Howe, III. Was any question on Disclosure Form answered yes? No [998430557] [10-2021] Edward Daniel
09/22/2010	17	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by M. Dawes Cooke, Jr. for Gedney Main Howe, III and Gedney Main Howe, III. [998430677] [10-2021] Morris Cooke
09/22/2010	18	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by John William Fletcher for Gedney Main Howe, III and Gedney Main Howe, III. [998430689] [10-2021] John Fletcher
09/22/2010	19	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Elizabeth S. Tipping for Edward F. Maracich,

DATE	#	DOCKET TEXT
		John C. Tanner and Martha L. Weeks. [998430986] [10-2021] Elizabeth Tipping
09/22/2010	20	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Appellant Edward F. Maracich. Was any question on Disclosure Form answered yes? No [998430987] [10-2021] Elizabeth Tipping
09/22/2010	21	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Appellant John C. Tanner. Was any question on Disclosure Form answered yes? No [998430991] [10-2021] Elizabeth Tipping
09/22/2010	22	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Appellant Martha L. Weeks. Was any question on Disclosure Form answered yes? No [998430995] [10-2021] Elizabeth Tipping
09/22/2010	23	DOCKETING STATEMENT filed by Appellants Edward F. Maracich, John C. Tanner and Martha L. Weeks. [10-2021] Elizabeth Tipping
09/23/2010	24	BRIEFING ORDER filed. Opening Brief and Appendix due 11/02/2010. Response Brief due 12/06/2010 [10-2021] (RW)
09/23/2010	25	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Gary L.

DATE	#	DOCKET TEXT
		Compton for Edward F. Maracich, John C. Tanner and Martha L. Weeks. [998431384] [10-2021] Gary Compton
09/23/2010		Initial mediation conference scheduled. [10-2021] (SLW)
10/04/2010	26	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Philip N. Elbert for Edward F. Maracich, John C. Tanner and Martha L. Weeks. [998438224] [10-2021] Philip Elbert
10/04/2010	27	DESIGNATION OF LEAD COUNSEL (Local Rule 12(b)) filed by Appellants Edward F. Maracich, John C. Tanner and Martha L. Weeks. Name of lead counsel: Philip N. Elbert. [10-2021] Elizabeth Tipping
10/08/2010	28	Notice filed re: challenge to constitutionality of law—FRAP 44 filed by Appellees Richard A. Harpootlian, Richard A. Harpootlian, Gedney Main Howe, III, Gedney Main Howe, III, A. Camden Lewis, Lewis & Babcock, Michael Spears and Michael Eugene Spears. [10-2021]—[Edited 10/08/2010 by MFT] Edward Daniel
10/08/2010	29	NOTICE ISSUED re: FRAP 44 notification of challenge to constitutionality of state or federal law to

DATE	#	DOCKET TEXT
		the United States Attorney General. [10-2021] (DHB)
10/18/2010	30	ORDER filed [998447438] updating/ resuming briefing order deadlines. Opening brief and appendix due 12/01/2010. Response brief due 01/12/2011 Copies to all parties. [10-2021] (RW)
10/27/2010	31	DESIGNATION OF LEAD COUNSEL (Local Rule 12(b)) filed by Appellees Richard A. Harpootlian, Richard A. Harpootlian, Gedney Main Howe, III, Gedney Main Howe, III, A. Camden Lewis, Lewis & Babcock, Michael Spears and Michael Eugene Spears. Name of lead counsel: M. Dawes Cooke, Jr. [10-2021] Morris Cooke
11/24/2010	32	MOTION filed by Appellants Edward F. Maracich, John C. Tanner and Martha L. Weeks to extend filing time for opening brief and appendix until 12/8/10. Date and method of service: 11/24/2010 ecf [998472518] [10-2021] Elizabeth Tipping
11/24/2010	33	ORDER filed [998472521] granting Motion to extend filing time [32], updating/resuming briefing order deadlines. Opening brief and appendix due 12/08/2010. Response brief due 01/19/2011 Copies to all parties. [10-2021] (RW)

DATE	#	DOCKET TEXT
12/06/2010	34	[Edited 12/06/2010 by RW]. Reason for Edit: Document Struck. Elizabeth Tipping
12/06/2010	35	MOTION filed by Appellants Edward F. Maracich, John C. Tanner and Martha L. Weeks to extend filing time for opening brief and appendix until December 10, 2010. Date and method of service: 12/06/2010 ecf [998479335] [10-2021] Elizabeth Tipping
12/06/2010	36	ORDER filed [998479339] granting Motion to extend filing time [35]; updating/resuming briefing order deadlines. Opening brief and appendix due 12/10/2010. Response brief due 01/21/2011 Copies to all parties. [10-2021] (RW)
12/10/2010	37	BRIEF filed by Appellants Edward F. Maracich, John C. Tanner and Martha L. Weeks in electronic and paper format. Type of Brief: Opening. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 12/10/2010. Is this a redacted brief? No If yes, have you verified that the redacted material cannot be revealed by cutting and pasting text? N/A [998483422] [10-2021] Philip Elbert

DATE	#	DOCKET TEXT
12/10/2010	38	NOTICE OF PAPER FILING filed by Appellants Edward F. Maracich, John C. Tanner and Martha L. Weeks. Type of paper document filed: appendix Date paper copies mailed, dispatched or delivered to court: 12/10/2010 Method of filing paper copies: courier [10-2021] Philip Elbert
12/10/2010	40	OPENING BRIEF (PAPER) file-stamped, on behalf of Edward F. Maracich, John C. Tanner and Martha L. Weeks. Number of pages: [54]. Sufficient: YES. Entered on Docket Date: 12/14/2010. [998484850] [10-2021] (RW)
12/10/2010	41	APPENDIX (PAPER) file-stamped, on behalf of Edward F. Maracich, John C. Tanner and Martha L. Weeks. Total number of volumes (including any sealed): 3. Total number of pages in all volumes: 1513. Total number of sealed volumes: 0. Entered on Docket Date: 12/14/2010. [998484855] [10-2021] (RW)
12/13/2010	39	NOTICE OF PAPER FILING filed by Appellants Edward F. Maracich, John C. Tanner and Martha L. Weeks. Type of paper document filed: other Description: Addendum to Brief of Appellants Date paper copies mailed, dispatched or delivered to

DATE	#	DOCKET TEXT
		court: 12/13/2010 Method of filing paper copies: courier [10-2021] Philip Elbert
12/13/2010	42	ADDENDUM/ATTACHMENT (PAPER) file-stamped on behalf of Edward F. Maracich, John C. Tanner and Martha L. Weeks. Number of pages: [34]. Entered on docket date: 12/14/2010. [998485095] [10-2021] (RW)
01/21/2011	43	BRIEF filed by Appellees Richard A. Harpootlian, Richard A. Harpootlian, Gedney Main Howe, III, Gedney Main Howe, III, A. Camden Lewis, Lewis & Babcock, Michael Spears and Michael Eugene Spears in electronic and paper format. Type of Brief: Opening & Response. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 01/21/2011. Is this a redacted brief? No If yes, have you verified that the redacted material cannot be revealed by cutting and pasting text? N/A [998508361] [10-2021] Edward Daniel
01/21/2011	44	RESPONSE BRIEF (PAPER) file-stamped, on behalf of Richard A. Harpootlian, Richard A. Harpootlian, Gedney Main Howe, III, Gedney Main Howe, III, A. Camden Lewis, Lewis & Babcock, Michael Spears

DATE	#	DOCKET TEXT
		and Michael Eugene Spears. Number of pages: [81]. Sufficient: YES. Entered on Docket Date: 01/24/2011. [998508827] [10-20211 (RW)
02/07/2011	45	BRIEF filed by Appellants Edward F. Maracich, John C. Tanner and Martha L. Weeks in electronic and paper format. Type of Brief: Reply. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 02/04/2011. Is this a redacted brief? No If yes, have you verified that the redacted material cannot be revealed by cutting and pasting text? N/A [998519130] [10-2021] Philip Elbert
02/07/2011	46	REPLY BRIEF (PAPER) filestamped, on behalf of Edward F. Maracich, John C. Tanner and Martha L. Weeks. Number of pages: [46]. Sufficient: YES. Entered on Docket Date: 02/07/2011. [998519545] [10-2021] (RW)
06/14/2011	47	CASE TENTATIVELY CALENDARED for oral argument during the 9/20/11 - 9/23/11 argument session. Notify Clerk's Office of any scheduling conflict by: 06/27/2011 [10-2021] (JLC)
07/20/2011	48	CASE CONTINUED FROM TENTATIVE CALENDAR TO AWAITING

DATE	#	DOCKET TEXT
		CALENDAR. [998636225] [10-2021] (JLC)
07/29/2011	49	CASE TENTATIVELY CALENDARED for oral argument during the 10/25/11 - 10/28/11 argument session. Notify Clerk's Office of any scheduling conflict by: 08/08/2011 [10-2021] (JLC)
08/05/2011	50	NOTICE RE: CONFLICT WITH PROPOSED ARGUMENT DATES by Appellants Edward F. Maracich, John C. Tanner and Martha L. Weeks. Argument Session: 10/25/11 - 10/28/11 Days you are available: None [10-2021] Philip Elbert
08/08/2011	51	CASE CONTINUED FROM TENTATIVE CALENDAR TO AWAITING CALENDAR. [998649571] [10-2021] (JLC)
09/02/2011	52	CASE TENTATIVELY CALENDARED for oral argument during the 12/6/11 - 12/9/11 argument session. Notify Clerk's Office of any scheduling conflict by: 09/12/2011 [10-2021] (JLC)
10/07/2011	53	CASE CALENDARED for oral argument. Date: 12/08/2011. Registration Time: 8:45 -9:00. Daily Arguments Begin: 9:30. [10-2021] (JLC)
10/11/2011	54	ORAL ARGUMENT ACKNOWLEDGMENT by Appellees Richard A. Harpootlian, Richard A. Harpootlian,

DATE	#	DOCKET TEXT
		Gedney Main Howe, III, Gedney Main Howe, III, A. Camden Lewis, Lewis & Babcock, Michael Spears and Michael Eugene Spears. Counsel arguing: M. Dawes Cooke, Jr. [998697319] [10-2021] Morris Cooke
10/11/2011	55	ORAL ARGUMENT ACKNOWLEDGMENT by Appellees Richard A. Harpootlian, Richard A. Harpootlian, Gedney Main Howe, III, Gedney Main Howe, III, A. Camden Lewis, Lewis & Babcock, Michael Spears and Michael Eugene Spears. Counsel arguing: John W. Fletcher [998697356] [10-2021] John Fletcher
10/11/2011	56	ORAL ARGUMENT ACKNOWLEDGMENT by Appellants Edward F. Maracich, John C. Tanner and Martha L. Weeks. Counsel arguing: Philip N. Elbert [998697895] [10-2021] Philip Elbert
12/08/2011	57	ORAL ARGUMENT heard before the Honorable Allyson K. Duncan, Andre M. Davis and James A. Wynn, Jr. Attorneys arguing case: Mr. Philip N. Elbert for Appellants Edward F. Maracich, Martha L. Weeks and John C. Tanner and Mr. Morris Dawes Cooke, Jr., Esq. for Appellee Gedney Main Howe, III. Courtroom Deputy: Joseph Coleman. [998739816] [10-2021] (JLC)

DATE	#	DOCKET TEXT
04/04/2012	58	PUBLISHED AUTHORED OPINION filed. Originating case number: 7:09-cv-01651-HMH Paper copies to all parties and the district court/agency. [998825807]. [10-2021] (RW)
04/04/2012	59	JUDGMENT ORDER filed. Disposition method: 10-2021 opn.p.arg. Decision: Affirmed. Originating case number: 7:09-cv-01651-HMH. Entered on Docket Date: 04/04/2012. [998825812] Copies to all parties and the district court/agency. [10-2021] (RW)
04/26/2012	60	Mandate issued. Referencing: [58] Published Authored Opinion, [59] Judgment order. Originating case number: 7:09-cv-01651-HMH. [10-2021] (RW)
07/10/2012	61	SUPREME COURT REMARK—petition for writ of certiorari filed. 07/02/2012. 12-25. [10-2021] (DHB)
09/25/2012	62	SUPREME COURT REMARK—petition for writ of certiorari granted. 09/25/2012 [10-2021] (DHB)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

[Filed 06/23/09]

Civil Action No. 7:09-1651-HMH

EDWARD F. MARACICH, MARTHA L. WEEKS, AND JOHN C. TANNER, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL EUGENE SPEARS, MICHAEL SPEARS, P.A., GEDNEY M. HOWE, III, GEDNEY M. HOWE, III, P.A., RICHARD A. HARPOOTLIAN, RICHARD A. HARPOOTLIAN, P.A., A. CAMDEN LEWIS, AND LEWIS & BABOCK, LLP,

Defendants.

CLASS ACTION COMPLAINT FOR VIOLATION OF DRIVER'S PRIVACY PROTECTION ACT

Plaintiffs Edward F. Maracich, Martha L. Weeks, and John C. Tanner, individually and on behalf of all others similarly situated, bring this action for violation of the Driver's Privacy Protection Act (DPPA) 18 U.S.C. §§ 2721–2725 and allege as follows:

JURISDICTION AND VENUE

1. This matter arises from the Defendants' unlawful acts in obtaining the Personal Information (as defined in 18 U.S.C. § 2725(3)) of Plaintiffs and the other Class Members from the South Carolina De-

partment of Motor Vehicles ("SCDMV") under false pretenses, and then using the Personal Information for the statutorily prohibited purpose of mailing lawyer advertising and solicitation materials to Plaintiffs and other motor-vehicle owners within the Class.

2. This Court has jurisdiction over this action pursuant to 18 U.S.C. § 2724 and 28 U.S.C. § 1331.

3. Venue is proper in this District pursuant to 28 U.S.C. § 1391, as at least one Defendant resides in this District. Venue is proper in this Division pursuant to Local Civil Rule 3.01 DSC, as at least one natural Defendant resides in this Division and at least one organizational Defendant does business relating to the events or omissions alleged herein in this Division.

PARTIES

4. Plaintiff Edward F. Maracich is an individual whose Personal Information was obtained by or on behalf of each of the Defendants for a purpose not permitted by the DPPA. Plaintiff Maracich also received the Defendants' advertising and solicitation materials, which were sent in violation of the DPPA. Plaintiff Maracich is a citizen and resident of Richland County, South Carolina. Plaintiff Maracich is a member and proposed representative of a class of individuals whose Personal Information was unlawfully obtained by or on behalf of each of the Defendants from the SCDMV and whose Personal Information was then used by the Defendants for the impermissible purpose of soliciting clients.

5. Plaintiff Martha L. Weeks is an individual whose Personal Information was obtained by or on behalf of each of the Defendants for a purpose not permitted by the DPPA. Plaintiff Weeks also received

the Defendants' advertising and solicitation materials, which were sent in violation of the DPPA. Plaintiff Weeks is a citizen and resident of Greenwood County, South Carolina. Plaintiff Weeks is a member and proposed representative of a class of individuals whose Personal Information was unlawfully obtained by or on behalf of each of the Defendants from the SCDMV and whose Personal Information was then used by the Defendants for the impermissible purpose of soliciting clients.

6. Plaintiff John C. Tanner is an individual whose Personal Information was obtained by or on behalf of each of the Defendants for a purpose not permitted by the DPPA. Plaintiff Tanner also received the Defendants' advertising and solicitation materials, which were sent in violation of the DPPA. Plaintiff Tanner is a citizen and resident of Lugoff, South Carolina. Plaintiff Tanner is a member and proposed representative of a class of individuals whose Personal Information was unlawfully obtained by or on behalf of each of the Defendants from the SCDMV and whose Personal Information was then used by the Defendants for the impermissible purpose of soliciting clients.

7. Upon information and belief, Defendant Michael Eugene Spears ("Defendant Spears") is a citizen and resident of Spartanburg County, South Carolina.

8. Upon information and belief, Defendant Michael E. Spears, P.A. is a professional association incorporated under the laws of South Carolina with its principal place of business in Spartanburg, South Carolina.

9. Upon information and belief, Defendant Gedney M. Howe, III ("Defendant Howe") is a citizen and

resident of Charleston County, South Carolina. Defendant Howe practices law at various times in the Spartanburg Division of the South Carolina District Court.

10. Upon information and belief, Defendant Gedney M. Howe, III, P.A. is a professional association incorporated under the laws of South Carolina with its principal place of business in Charleston County, South Carolina.

11. Upon information and belief, Defendant Richard A. Harpootlian ("Defendant Harpootlian") is a citizen and resident of Richland County, South Carolina. Defendant Harpootlian practices law at various times in the Spartanburg Division of the South Carolina District Court.

12. Upon information and belief, Defendant Richard A. Harpootlian, P.A. is a professional association incorporated under the laws of South Carolina with its principal place of business in Richland County, South Carolina.

13. Upon information and belief, Defendant A. Camden Lewis ("Defendant Lewis") is a citizen and resident of Richland County, South Carolina. Defendant Lewis practices law at various times in the Spartanburg Division of the South Carolina District Court.

14. Upon information and belief, Defendant Lewis & Babcock, LLP ("Defendant Lewis & Babcock") is a South Carolina licensed limited liability partnership with its principal place of business in Richland County, South Carolina.

GENERAL ALLEGATIONS

15. The DPPA prohibits a state department of motor vehicles from disclosing Personal Information about any individual obtained by the department in connection with a motor vehicle record except for certain purposes enumerated in 18 U.S.C. § 2721(b). Personal Information is defined as "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5- digit zip code), telephone number, and medical or disability information..." *See* 18 U.S.C. § 2725(3).

16. There are fourteen permissible purposes for disclosure of Personal Information set forth in the DPPA. Pursuant to 18 U.S.C. § 2721(b)(4), Personal Information may be disclosed "for use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court." Acquiring Personal Information from motor vehicle records for the purpose of finding and soliciting clients for a lawsuit is not permitted by 18 U.S.C. § 2721(b)(4). *See Wemhoff v. District of Columbia*, 887 A.2d 1004 (D.C. 2005).

17. The DPPA includes a separate provision concerning disclosure of Personal Information for solicitation or marketing. Pursuant to 18 U.S.C. § 2721(b)(12), Personal Information may be disclosed "for bulk distribution for surveys, marketing or solicitations *if the State has obtained the express consent of the person to whom such personal information pertains*." (Emphasis supplied.)

18. On or about June 23, 2006, Defendant Harpootlian, on behalf of all of the Defendants, sent a letter to the SCDMV FOIA Department. In this letter Defendant Harpootlian requested information concerning:

> Private purchases of new or used automobiles in Spartanburg County during the week of May 1-7, 2006, including the name, address, and telephone number of the buyer, dealership where purchased, type of vehicle purchased, and date of purchase.

Defendant Harpootlian represented to the SCDMV that this request for disclosure of Personal Information was being made for a use and purpose permitted by 18 U.S.C. § 2721(b)(4); however, the requested Personal Information was in fact being requested and was obtained for the purpose of solicitation, which is not permitted by 18 U.S.C. § 2721(b)(4). A copy of the letter dated June 23, 2006 is attached hereto as *Exhibit A*.

19. On or about August 24, 2006, Defendant Harpootlian, on behalf of all of the Defendants, sent a letter to the SCDMV FOIA Department. In this letter Defendant Harpootlian requested information concerning:

> Private purchases of new or used automobiles in Charleston County, Richland County, York County, Lexington County, and Greenville County during the week of May 1-7, 2006, including the name, address, and telephone number of the buyer, dealership where the vehicle was purchased, type of vehicle purchased, and the date of purchase.

Defendant Harpootlian represented to the SCDMV that this request for disclosure of Personal Information was being made for a use and purpose permitted by 18 U.S.C. § 2721(b)(4); however, the requested Personal Information was in fact being requested and was obtained for the purpose of solicitation, which is not permitted by 18 U.S.C. § 2721(b)(4). Defendant Harpootlian copied Defendant Lewis, Defendant Spears, and Brady Thomas, an attorney who practices with Defendant Lewis & Babcock, on the August 24, 2006 letter. A copy of the letter dated August 24, 2006 is attached hereto as *Exhibit B*.

20. On or about October 26, 2006, Defendant Harpootlian, on behalf of all of the Defendants, sent a letter to the SCDMV FOIA Department. In this letter Defendant Harpootlian requested information concerning:

> Private purchases of new or used automobiles during the weeks of May 1, 2006 through May 14, 2006, including the name, address, and telephone number of the buyer, the type of vehicle purchased and the date of the purchase for the following South Carolina dealerships...

and listed more than three hundred dealerships across South Carolina. Defendant Harpootlian represented to the SCDMV that this request for disclosure of Personal Information was being made for a use and purpose permitted by 18 U.S.C. § 2721(b)(4); however, the requested Personal Information was in fact being requested and was obtained for the purpose of solicitation, which is not permitted by 18 U.S.C. § 2721(b)(4). A copy of the letter dated October 26, 2006 is attached hereto as *Exhibit C*.

21. On or about January 19, 2007, Defendant Harpootlian, on behalf of all of the Defendants, sent a letter to the SCDMV FOIA Department. In this letter Defendant Harpootlian requested information concerning:

> Private purchases of new or used automobiles during the weeks of June 1, 2006 through September 2, 2006, including the name, address, and telephone number of the buyer, the type of vehicle purchased and the date of the purchase for the following South Carolina dealerships...

and listed twenty-four dealerships. Defendant Harpootlian represented to the SCDMV that this request for disclosure of Personal Information was being made for a use and purpose permitted by 18 U.S.C. § 2721(b)(4); however, the requested Personal Information was in fact being requested and was obtained for the purpose of solicitation, which is not permitted by 18 U.S.C. § 2721(b)(4). Defendant Harpootlian copied Defendant Lewis, Defendant Spears, Defendant Howe, and Brady Thomas of Defendant Lewis & Babcock on the January 19, 2007 letter. A copy of the letter dated January 19, 2007 is attached hereto as *Exhibit D*.

22. On or about January 22, 2007, Defendant Harpootlian, on behalf of all of the Defendants, sent a letter to the SCDMV FOIA Department. In this letter Defendant Harpootlian requested information concerning:

> Private purchases of new or used automobiles during the weeks of June 1, 2006 through September 2, 2006, including the name, address, and telephone number of the buyer, the type of vehicle purchased and the date of the purchase for the following South Carolina dealerships...

and listed seven dealerships. Defendant Harpootlian represented to the SCDMV that this request for disclosure of Personal Information was being made for a use and purpose permitted by 18 U.S.C. § 2721(b)(4); however, the requested Personal Information was in fact being requested and was obtained for the purpose of solicitation, which is not permitted by 18 U.S.C. § 2721(b)(4). Defendant Harpootlian copied Defendant Lewis, Defendant Spears, Defendant Howe, and Brady Thomas of Defendant Lewis & Babcock on the January 22, 2007 letter. A copy of the letter dated January 22, 2007 is attached hereto as *Exhibit E*.

23. On or about January 23, 2007, Defendant Harpootlian, on behalf of all of the Defendants, sent a letter to the SCDMV FOIA Department. In this letter Defendant Harpootlian requested information concerning:

> Private purchases of new or used automobiles during the weeks of September 1, 2005 through September 14, 2005 and December 10, 2005 through December 24, 2005, including the name, address, and telephone number of the buyer, the name of the South Carolina dealership which the new or used automobile was purchased, and the date of the purchase.

Defendant Harpootlian represented to the SCDMV that this request for disclosure of Personal Information was being made for a use and purpose permitted by 18 U.S.C. § 2721(b)(4); however, the requested Personal Information was in fact being requested and was obtained for the purpose of solicitation, which is not permitted by 18 U.S.C. § 2721(b)(4). A copy of the letter dated January 23, 2007 is attached hereto as *Exhibit F*.

24. On or about January 4, 2007, the Defendants mailed solicitation letters to individuals whose Personal Information was obtained from the SCDMV pursuant to the FOIA letters sent by Defendant Harpootlian. In these letters, the Defendants solicited clients for a lawsuit against certain dealerships, and offered a free consultation to all recipients. A representative copy of the letters sent on January 4, 2007 was filed with the Office of the Disciplinary Counsel of the Supreme Court of South Carolina by Brady Thomas of Defendant Lewis & Babcock on or about January 9, 2007. The representative copy filed with the Office of the Disciplinary Counsel was signed by Defendant Lewis. A copy of the letter filed with the Office of the Disciplinary Counsel is attached hereto as *Exhibit G*.

25. On or about January 23, 2007, the Defendants mailed solicitation letters to individuals whose Personal Information was obtained from the SCDMV pursuant to the FOIA letters sent by Defendant Harpootlian. In these letters, the Defendants solicited clients for a lawsuit against certain dealerships, and offered a free consultation to all recipients. Some, if not all, of the solicitation letters sent on or about January 23, 2007 were signed by Defendant Lewis. A representative copy of the solicitation letter dated January 23, 2007 is attached hereto as *Exhibit H*.

26. On or about March 1, 2007, the Defendants mailed solicitation letters to individuals whose Personal Information was obtained from the SCDMV pursuant to the FOIA letters sent by Defendant Harpootlian. In these letters, the Defendants solicited clients for a lawsuit against certain dealerships, and offered a free consultation to all recipients. A representative copy of the letters sent on March 1,

2007 was filed with the Office of the Disciplinary Counsel of the Supreme Court of South Carolina by Defendants. The representative copy filed with the Office of the Disciplinary Counsel was signed by Defendant Lewis. A copy of the March 1, 2007 solicitation letter filed with the Office of the Disciplinary Counsel is attached hereto as *Exhibit I*.

27. On or about March 5, 2007, the Defendants mailed solicitation letters to individuals whose Personal Information was obtained from the SCDMV pursuant to the FOIA letters sent by Defendant Harpootlian. In these letters, the Defendants solicited clients for a lawsuit against certain dealerships, and offered a free consultation to all recipients. A representative copy of the letters sent on March 5, 2007 was filed with the Office of the Disciplinary Counsel of the Supreme Court of South Carolina by Defendants. The representative copy filed with the Office of the Disciplinary Counsel was signed by Defendant Lewis. A copy of the March 5, 2007 solicitation letter filed with the Office of the Disciplinary Counsel is attached hereto as *Exhibit J*.

28. On or about May 8, 2007, the Defendants mailed solicitation letters to individuals whose Personal Information was obtained from the SCDMV pursuant to the FOIA letters sent by Defendant Harpootlian. In these letters, the Defendants solicited clients for a lawsuit against certain dealerships, and offered a free consultation to all recipients. Some, if not all, of the solicitation letters sent on or about May 8, 2007 were signed by Defendant Harpootlian. A representative copy of the solicitation letter dated May 8, 2007 is attached hereto as *Exhibit K*.

29. Defendants did not limit, and made no attempt to limit, their requests for or use of protected Per-

sonal Information to instances in which an individual had given express consent for the disclosure of their Personal Information for the purpose of solicitation as required by the DPPA, but instead obtained and made use of the Personal Information to identify and send letters to individuals who had not consented to such disclosure for solicitation.

30. Plaintiff Maracich was among the individuals whose Personal Information was knowingly obtained from the SCDMV for the purpose of solicitation, in violation of the DPPA. Plaintiff Maracich's Personal Information was also impermissibly used for the purpose of solicitation, and he received the March 1, 2007 mailed advertising and solicitation material from the Defendants. Plaintiff Maracich did not consent to the disclosure of his Personal Information for the purpose of solicitation.

31. Likewise, Plaintiffs Weeks and Tanner were among the individuals whose Personal Information was knowingly obtained from the SCDMV for the purpose of solicitation, in violation of the DPPA. The Personal Information of Plaintiffs Weeks and Tanner was also impermissibly used for the purpose of solicitation, and they received mailed advertising and solicitation material from the Defendants. Plaintiffs Weeks and Tanner did not consent to the disclosure of their Personal Information for the purpose of solicitation.

32. On March 7, 2007, prior to the final solicitation cited herein, undersigned counsel sent a letter to Defendant Lewis advising that the Defendants' actions in obtaining Personal Information from the SCDMV and using that Personal Information to solicit clients violated state law. A copy of counsel's letter to Defendant Lewis is attached hereto as *Ex-*

hibit L. Defendant Lewis responded by letter incorrectly dated February 16, 2007 denying that the Defendants' actions violated state law. A copy of Defendant Lewis' response is attached hereto as *Exhibit M.* As noted above, shortly thereafter, Defendants sent another solicitation letter dated May 8, 2007 in violation of the DPPA.

33. As described above, on several occasions since June 23, 2006, Defendants have knowingly, willfully and recklessly obtained the Personal Information of Plaintiffs and the other Class Members from the SCDMV, disclosed it to other persons, and/or used it for the improper purpose of mailing lawyer advertising and solicitation materials to Plaintiffs and other motor-vehicle owners within the Class. Each act of obtaining, disclosing, and/or using such Personal Information constitutes a separate violation of the DPPA by Defendants.

CLASS ACTION ALLEGATIONS

34. Plaintiffs bring this action as a Class Action pursuant to Rule 23(a), (b)(1), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure. Beginning on or about June 23, 2006, each Defendant knowingly obtained, used, or disclosed Personal Information of Plaintiffs and the Class Members for purposes not permitted by the DPPA.

35. The Class or Class Members consist of:

> All persons whose Personal Information was knowingly obtained by Defendants, disclosed to other persons by Defendants, and/or used for mailing the advertising and solicitation materials described above from June 23, 2006 through Final Judgment.

All persons who consented to disclosure of their Personal Information for the purpose of solicitation are excluded from the Class definition.

36. The numerous requirements of Rule 23(a)(1) are satisfied in that there are too many Class Members for joinder of all of them to be practicable. Upon information and belief, Defendants obtained the Personal Information of approximately 10,000 individual motor-vehicle owners and mailed them the advertising and solicitation materials referred to above. In addition to the individual motor-vehicle owners, the Class also includes every person whose Personal Information appears on the records obtained by [sic] from the SCDMV by Defendants, including but not limited to spouses, children, and other residents of the motor-vehicle owners' homes. *See Margan v. Niles*, 250 F. Supp. 2d 63 (N.D. N.Y. 2003).

37. The claims of the Class Members raise numerous common issues of law and fact, thereby satisfying the commonality requirements of Rule 23(a)(2). The principal question is whether the Defendants' conduct in knowingly obtaining, disclosing, or using Personal Information contained in motor vehicle records was prohibited by, and therefore violated, the DPPA. The interests of Plaintiffs are coextensive with the Class Members on the question of the Defendants' liability pursuant to 18 U.S.C. § 2724 concerning violations of the DPPA.

38. The claims of the Plaintiffs are typical of the claims of each Class Member, which arise from the same operative facts and are based upon the same legal grounds. The particular facts and circumstances that show that the Plaintiffs' claims are typical of the claims of each Class Member are that between June

23, 2006 to the present, the Plaintiffs' Personal Information was contained in motor vehicle records. This information has been knowingly obtained, disclosed, and/or used by Defendants without the consent of the Plaintiffs for purposes not permitted by the DPPA. Likewise, during the same time period, each Class Member's Personal Information was knowingly obtained, disclosed, and/or used by Defendants without the consent of the Class Members for purposes not permitted by the DPPA. The requirement of typicality found in Rule 23(a)(3) is satisfied because proof of the elements of the Plaintiffs' claims will demonstrate the Defendants' liability to all Class Members.

39. The Plaintiffs will fairly and adequately protect the interests of the Class and of each Class Member. They are committed to vigorously pursuing this matter on behalf of the Class. Their interests are aligned with the interests of the Class Members, with whom they share a common right of recovery based upon the same essential facts. There are no defenses of a unique nature that may be asserted against the Plaintiffs individually, as distinguished from the other members of the Class, and the relief sought is common to the Class. The Plaintiffs do not have any interests that are in conflict with or are antagonistic to the interests of the Class Members. The Plaintiffs have retained attorneys competent and experienced in class action and complex civil litigation to represent them and the Class in this litigation. The requirements of Rule 23(a)(4) are therefore satisfied.

40. The Plaintiffs' claims are maintainable on behalf of the Class under Rule 23(b)(1) because inconsistent or varying adjudications with respect to individual Class Members would establish incompatible standards of conduct for the Defendants. This action

asks this Court to hold that the Defendants' actions in obtaining, disclosing and/or using the Personal Information of Class Members for the purpose of solicitation violated the DPPA and to enjoin Defendants from taking such actions in the future. If other courts were to hold that these actions did not violate the DPPA, the Defendants would be faced with incompatible standards of conduct with respect to future acts concerning the Personal Information of Class Members.

41. The Plaintiffs' claims are maintainable on behalf of the Class under Rule 23(b)(2) because the Defendants' actions affected all Class Members in the same manner, making appropriate final declaratory and injunctive relief with respect to the Class as a whole. For example, Plaintiffs seek with respect to the Class as a whole a declaration that Defendants' actions in obtaining, disclosing, and/or using the Personal Information of Class Members for the purpose of solicitation violated the DPPA. Furthermore, injunctive relief is necessary to prevent further improper use of the Class Members' Personal Information and to prevent other individuals whose Personal Information is or may later be found within a motor vehicle record from becoming victims of Defendants' unlawful acts.

42. The Plaintiffs' claims are maintainable on behalf of the Class under Rule 23(b)(3) because the common factual and legal issues in this case are sufficiently cohesive to warrant adjudication by representation. In particular, the Plaintiffs and Class Members have suffered a common cause of injury in the Defendants' obtaining, disclosing and/or using the Class Members' Personal Information in violation of the DPPA. Questions of law or fact common to the

Plaintiffs' claims and the claim of each Class Member predominate over any question of law or fact affecting individual Class Members.

43. The Plaintiffs' claims are further maintainable on behalf of the Class under Rule 23(b)(3) because a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Individual litigation of the claims of all Class Members is economically unfeasible and procedurally impracticable. The assertion of separate individual claims is impractical and cost-prohibitive not only for the individual claimant, but for the Defendants and the court system itself, which would be burdened by individual claims filed by each Class Member. Additionally, individual litigation would also present the potential for varying, inconsistent or contradictory judgments while magnifying the delay and expense to all parties and to the court system, thus resulting in multiple trials of the same legal issue and creating the possibility of repetitious litigation. As a result, the desirability to concentrate litigation in this forum is significant. The interest of Class Members in individually controlling the prosecution of separate claims against Defendants is remote because the amount of liquidated damages provided by the DPPA is set at $2,500 per violation and it is unlikely that any Class Member's actual damages will exceed the statutory amount. Maintaining this action as a class action in this forum is desirable as it will permit the claims of the Plaintiffs and the Class Members to be adjudicated efficiently, based upon a common right of recovery arising from the same set of facts. Management of this class action is likely to present significantly fewer difficulties than those presented in other class actions. Upon information and belief, no other putative Class Member has filed

an individual action or putative class action against Defendants for the claims set forth in this Complaint.

COUNT I

44. The allegations contained in paragraphs 1 through 43 of this Complaint are incorporated by reference as if fully set forth herein.

45. On multiple occasions beginning on or about June 23, 2006, Defendants, through Defendant Harpootlian, have knowingly, willfully and/or recklessly obtained the Personal Information of the Plaintiffs and the other Class Members from the SCDMV for the improper purpose of mailing lawyer advertising and solicitation materials.

46. On multiple occasions after June 23, 2006, Defendants have knowingly, willfully and recklessly disclosed and/or used the Personal Information of the Plaintiffs and the other Class Members for the improper purpose of mailing lawyer advertising and solicitation materials to the Plaintiffs and other Class Members.

47. The Plaintiffs and the other Class Members did not expressly consent to the use of their Personal Information for the purpose of solicitation.

48. Each act of obtaining, disclosing and/or using the Personal Information of the Plaintiffs and the other Class Members for the improper purpose of solicitation of clients constitutes a separate violation of the DPPA by Defendants.

49. Pursuant to 18 U.S.C. § 2724, the Defendants are liable to the Plaintiffs and the Class Members for knowingly obtaining, disclosing and/or using the Personal Information for impermissible purposes for

their actual damages, or liquidated damages of $2,500 per violation, per person, whichever is greater; and reasonable attorneys' fees and other litigation costs reasonably incurred.

50. Pursuant to 18 U.S.C. § 2724(b)(2), this Court should award punitive damages because Defendants acted with willful and/or reckless disregard for the law.

51. Pursuant to 18 U.S.C. § 2724, this Court should enter a judgment permanently enjoining and restraining the Defendants from further violating the DPPA and requiring the Defendants to cease and desist from obtaining, disclosing or using Personal Information from motor vehicle records for purposes not permitted by the DPPA.

COUNT II

52. The allegations contained in paragraphs 1 through 50 of this Complaint are incorporated by reference as if fully set forth herein.

53. The DPPA imposes an obligation upon all individuals who obtain Personal Information from a state department of motor vehicles to do so only for the specified purposes set forth in the statute. The DPPA further imposes an obligation upon individuals who use Personal Information obtained from a state department of motor vehicles to do so only for the specified purposes set forth in the statute.

54. The Defendants are subject to the obligations and restrictions imposed by the DPPA. The Defendants owed a duty to Plaintiffs and other Class Members to comply with the provisions of the DPPA in obtaining, disclosing, and/or using their Personal Information.

55. The Defendants negligently, willfully and/or recklessly breached this duty by their actions in obtaining, disclosing, and/or using the Personal Information of Plaintiffs and the other Class Members for purposes not permitted by the DPPA.

56. These actions of negligent, willful and/or reckless misconduct by Defendants were a direct and proximate cause of the damages sustained by the Plaintiffs and other Class Members by the unlawful obtaining, disclosure, and/or use of their Personal Information and resulting violation of their privacy.

COUNT III

57. The allegations contained in paragraphs 1 through 55 of this Complaint are incorporated by reference as if fully set forth herein.

58. The Defendants, acting individually, each as an agent for the others, and/or by and through other authorized agents or employees, did knowingly violate the DPPA in obtaining, disclosing, and/or using the Personal Information of Plaintiffs and other Class Members for purposes not permitted by the DPPA.

59. Under the doctrine of *respondeat superior*, each Defendant is liable for the unlawful acts of each other Defendant in their violations of the DPPA.

COUNT IV

60. The allegations contained in paragraphs 1 through 58 of this Complaint are incorporated by reference as if fully set forth herein.

61. The Defendants acted in concert and for a common purpose for monetary gain as joint venture partners with an agreement to share the profits, if any, of their unlawful acts, and therefore are jointly

and severally liable to Plaintiffs and the other Class Members for the damages awarded by this Court.

WHEREFORE, Plaintiffs, individually and on behalf of the Class Members, pray for judgment against Defendants, jointly and severally, as follows:

(a) That proper process issue and be served upon Defendants, and that they be required to appear and answer this Complaint within the time required by law;

(b) That the Court issue an Order certifying that this action may be maintained as a class action, appointing the Plaintiffs and their counsel to represent the Class, and directing that reasonable notice of this action be given to all Class Members;

(c) That the Court declare that the acts of the Defendants in obtaining, disclosing, and/or using the Personal Information of Plaintiffs and the Class Members for the purpose of solicitation of clients violated the DPPA;

(d) That the Court award the Plaintiffs and each Class Member liquidated damages in the amount of $2,500 for each instance of Defendants' obtaining, disclosing, and/or using their respective Personal Information;

(e) That the Court award the Plaintiffs and each Class Member compensatory damages in an amount sufficient to compensate them in accordance with law for the injuries caused by the Defendants;

(f) That the Court award the Plaintiffs and each Class Member punitive damages in an amount sufficient to punish the Defendants for their

misconduct and to deter the Defendants and others from similar misconduct in the future;

(g) That the Court enter a judgment permanently enjoining and restraining the Defendants from further violating the DPPA and requiring the Defendants to cease and desist from obtaining, disclosing or using Personal Information from motor vehicle records for purposes not permitted by the DPPA;

(h) That the Court award the Plaintiffs and the Class Members their reasonable attorneys' fees and other litigation costs;

(i) That the Court award the Plaintiffs and each Class Member prejudgment and postjudgment interest;

(j) That the Court award such other preliminary and equitable relief as the Court determines to be appropriate; and

(k) That the Court grant such further and other general relief to which the Plaintiffs and the Class members may be entitled.

Respectfully submitted,

June 22, 2009

s/ J. Gregory Studemeyer
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June 23, 2006

Beth Parks
SCDMV
FOIA Department
PO Box 1498
Blythewood, SC 29016-1498

Dear Ms. Parks:

This is a Freedom of Information request in anticipation of litigation as provided for in SC Code Ann. § 30-4-30, and pursuant to the exception in 18 USC § 2721(b)(4) of the Driver's Privacy Protection Act of 1994 (copy enclosed.)

I have plaintiffs who have complained of certain conduct as a result of their transactions with car dealers, conduct which I believe to be a potential violation of state law. I am attempting to determine if this is common practice, and am accordingly submitting this FOIA request.

Please provide the following information;

- Private purchases of new or used automobiles in Spartanburg County during the week of May 1-7, 2006, including the name, address, and telephone number of the buyer, dealership where purchased, type of vehicle purchased, and date of purchase

Pursuant to § 30-4-30, please fulfill this request within 15 days of receipt of this letter.

Thank you for your assistance in this matter.

With warm personal regards, I am

Sincerely,

/s/ Richard A. Harpootlian
Richard A. Harpootlian

/rb

cc: Val Valenta, Chief Legal Counsel, SCDMV

[Received Jun 29, 2006]

CHAPTER 123. PROHIBITION ON RELEASE AND USE OF CERTAIN PERSONAL INFORMATION FROM STATE MOTOR. VEHICLE RECORDS

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1994. Act Sept. 13, 1994, P.L. 103-322, Title XXX, §300002(a), 108 Stat. 2099, added the chapter heading.

1996. Act Oct. 11, 1996, P.L. 104-294, Title VI, §604(a)(3), 110 Stat. 3506 (effective on 9/13/94, pursuant to §604(d) of such Act, which appears as 18 USCS §13 note), added the chapter analysis,

§ 2721. Prohibition on release and use of certain personal information from State motor vehicle records [Caution: See note below with respect to the effective date of this section.]

(a) In general. Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.

(b) Permissible uses. Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle of driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufactures, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of

1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49 [49 USCS §§ 30101 et seq., 30501 et seq., 32101 et seq. -33101 et seq.], and may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal,

State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49 [49 USCS §§31301 et seq.].

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the motor vehicle department his provided in a clear and conspicuous manner on forms for issuance or renewal of operator's permits; titles, registrations, or identification cards, notice that personal information collected by the department may be disclosed to any business or

person, and has provided in a clear and conspicuous manner on such forms an opportunity to prohibit such disclosures.

(12) For bulk distribution for surveys, marketing or solicitations if the motor vehicle department has implemented methods and procedures to ensure that—

(A) individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses; and

(B) the information will be used, rented, or sold solely for bulk distribution for surveys, marketing, and solicitations, and that surveys, marketing, and solicitations will not be directed at those individuals who have requested in a timely fashion that they not be directed at them;

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) Resale or redisclosure. An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b) (11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsec-

tion (b)(11)) that resells or rediscloses personal information covered by this chapter [18 USCS §§ 2701 et seq.] must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

(d) Waiver procedures. A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

(Added Sept. 13, 1994; P.L. 103-322, Title XXX, §300002(a), 108 Stat. 2094; Oct. 11, 1996, P.L. 104-287, § 1, 110 Stat. 3388; Oct. 11, 1996, P.L. 104-294, Title VI §604(b)(46), 110 Stat. 3509.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

The "National Traffic and Motor Vehicle Safety Act of 1966", is Act Sept. 9, 1966, P.L. 89-563, 80 Stat. 718, which appears generally as 15 USCS §§1381 et seq. For full classification of such Act, consult USCS Tables volumes.

"Titles I and IV of the Anti-Car Theft Act of 1992", referred to in this section, are Title I and IV of Act Oct. 25, 1992, P.L. 102-519. For classification of such Titles, consult USCS Tables volumes.

Effective Date Of Section: This section effective 3 years after enactment, pursuant to Act Sept. 13, 1994, P.L. 103-322, Title XXX, §300003, 108 Stat. 2102, which appears as a note to this section.

Amendments:

1996. Act Oct. 11, 1996, P.L. 104-287, in subsec. (b), in the introductory matter, substituted "titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49" for "the Automobile Information Disclosure Act, the Motor Vehicle Information and Cost Saving Act, the National Traffic and Motor Vehicle Safety Act of 1966, the Anti-Car Theft Act of 1992, and the Clean Air Act" and, in para. (9), substituted "chapter 313 of title 49" for "the Commercial Motor Vehicle Safety Act of 1986 (49 U.S.C. App. 2710 et seq.)".

Act Oct. 11, 1996, P.L. 104-294 (effective on 9/13/94, pursuant to §604(d) of such Act, which appears as 18 USCS §13 note), in subsec. (c), substituted "covered by this chapter" for "covered by this title".

Short titles:

Act Sept. 13, 1994, P.L. 103-322, Title XXX, § 300001, 108 Stat. 2094, provides: "This title [18 USCS §§2721 et seq. generally, for Full classification, consult USCS Tables volumes] may be cited as the 'Driver's Pitney Protection Act of 1994'.".

Other provisions: Effective date of 18 USCS §§2721-2725; implementation Act Sept. 13, 1994, P.L. 103-322, Title XXX, §300003, 108 Stat. 2102, provides: "The amendments made by section 300002 [adding 18

USCS §§2721-2725 and amending the table of chapters preceding 18 USCS §1] shall become effective on the date that is 3 years after the date of enactment of this Act. After the effective date, if a State has implemented a procedure under section 2721(b) (11) and (12) of title 18, United States Code, as added by section 2902 [300002], for prohibiting disclosures or uses of personal information, and the procedure otherwise meets the requirements of subsection (b) (11) and (12), the State shall be in compliance with subsection (b) (11) and (12) even if the procedure is not available to individuals until they renew their license, title, registration or identification card, so long as the State provides some other procedure for individuals to contact the State on their own initiative to prohibit such uses or disclosures. Prior to the effective date, personal information covered by the amendment made by section 300002 may be released consistent with State law or practice."

§ 2722. Additional unlawful acts [Caution: See note below with respect to the effective date of this section.]

(a) Procurement for unlawful purpose. It shall be unlawful far any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title;

(b) False representation. It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

(Added Sept. 13, 1994, P.L. 103-322, Title XXX, §300002(a), 108 Stat. 2101.)

Effective Date Of Section: This section effective 3 years after enactment, pursuant to Act Sept. 13, 1994, P.L. 103-322, Title XXX, §300003, 108 Stat. 2102, which appears as 18 USCS § 2721 note.

§ 2723. Penalties [Caution: See note below with respect to the effective date of this section.]

* * * *

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August 24, 2006

VIA CERTIFIED MAIL
RETURN-RECEIPT REQUESTED

Beth Parks
SC Department of Motor Vehicles
Freedom of Information Act Request
Post Office Box 1489
Blythewood, South Carolina 29016-1498

Dear Ms. Parks:

This is a Freedom of Information request in anticipation of litigation as provided for in SC Code Ann. § 30-4-30 and pursuant to the exception in 18 USC § 2721(b)(4) of the Driver's Privacy Protection Act of 1994 (copy enclosed.)

Please provide the following information;

- Private purchases of new or used automobiles in Charleston County, Richland County, York County, Lexington County, and Greenville County during the week of May 1-7, 2006, including the name, address, and telephone number of the buyer, dealership where the vehicle was purchased, type of vehicle purchased, and the date of purchase.

Pursuant to § 30-4-30, please fulfill this request within 15 days upon receipt of this correspondence.

Thank you for your assistance in this matter and if you should have any questions, please do not hesitate to contact me.

With warm personal regards, I am

Sincerely,

/s/ Richard A. Harpootlian
Richard A. Harpootlian

[Received Aug 25, 2006]

/hmh
enclosure

cc: A. Camden Lewis, Esquire (*via U.S. Mail*)
Brady Thomas, Esquire (*via U.S. Mail*)
Mike Spears, Esquire (*via U.S. Mail*)

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Facsimile (803) 252-4810

[Received Oct 31, 2006]

October 26, 2006

VIA ELECTRONIC MAIL & U.S. MAIL

Beth Parks
SC Department of Motor Vehicles
Freedom of Information Act Request
Post Office Box 1489
Blythewood, South Carolina 29016-1498

Dear Ms. Parks:

This is a Freedom of Information Act request pursuant to SC Code Ann. § 30-4-30, and to the exception in 18 USC § 2721(b)(4) of the Driver's Privacy Protection Act of 1994.

Please provide the following information pursuant to this request:

> Private purchases of new or used automobiles during the weeks of May 1, 2006 through May 14, 2006, including the name, address, and telephone number of the buyer, the type of vehicle purchased and the date of the purchase for the following South Carolina dealerships:

-Aiken-	
Bob Richards Nissan	N. Augusta
Dick Smith Chrysler-Jeep	Aiken
Goodman Chevrolet, Inc.	New Ellenton
Henna Chevrolet-Olds-Cad. LLC	Aiken
Honda Cars of Aiken	Aiken
Johnson Motor Company of SC	Aiken
Satcher Ford-Licoln-Mercury	Aiken
Taylor Toyota	N. Augusta
-Allendale-	
Sanders Truck Sales	Allendale
-Anderson-	
Carolina Ford	Honea Path
Carolina International Trucks of Anderson	Williamston
Clinkscales Chevrolet, Inc.	Belton
Fairway Ford-Mazda	Anderson
Kia of Anderson	Anderson
Piedmont Chr-Jeep	Anderson
Piedmont Honda	Anderson
Planet Ford	Belton
Ralph Hayes Toyota, Inc.	Anderson
Tom Hunter Pon-Bui-GMC, LLC	Anderson
Upstate Automotive (Chevrolet-Cadillac)	Anderson
Upstate Automotive (Isuzu-Kia)	Anderson
Upstate Automotive (Mitsubishi)	Anderson
Upstate Automotive (Nissan)	Anderson
-Bamberg-	
Gibbes Ford, Inc.	Bamberg
Zeigler Chevrolet, Inc.	Bamberg

-Barnwell-	
B&B Ford, Inc.	Barnwell
Whittle Motor Company, Inc.	Williston
-Beaufort-	
Butler Chry-Dodge-Jeep	Beaufort
Caroline Volvo	Bluffton
Hilton Head Automotive LLC	Hilton Head
Hilton Head Honda	Hilton Head
Land Rover Hilton Head	Bluffton
Modern Classic Motors	Hilton Head Island
O.C. Welch Ford-Lincoln-Mercury	Bluffton
O.C. Welch Ford-Lincoln-Mercury	Bluffton
Parks Automotive Group	Beaufort
Parks Cadillac	Bluffton
Stokes Honda Cars of Beaufort, Inc.	Beaufort
Stokes Mitsubishi	Beaufort
Stokes-Brown Toyota	Beaufort
-Berkley-	
Dick Smith Chevrolet, Inc.	Moncks Corner
Hoover Jeep-Chrysler, Inc.	Summerville
Hoover Motors, Inc.	Moncks Corner
McElveen Pon-Bui-GMC, Inc.	Summerville
Woody Bilton Ford, Inc.	Moncks Corner
-Charleston-	
Altman Lin-Mer-Hyu	N. Charleston
Baker Motor Company	Charleston
Carolina International Trucks-Char	Charleston
Charleston Mitsubishi	Charleston
Gene Reed Toyota	Charleston
Harold Arnold's Sentry Bui-Pon-GMC	Charleston
Hendrick Honda of Charleston	Charleston

Hoover Chrysler-Jeep, Inc.	Charleston
Hughes Motors, Inc.	Charleston
Jones Ford, Inc.	N. Charleston
Kia Country	Charleston
Lexus of Charleston	Charleston
Low Country Mazda	Mt. Pleasant
Low Country Volkwagen	Mt. Pleasant
Marathon Chevrolet of N. Charleston	Charleston
Marchant Chevrolet, Inc.	Ravenel
McDaniels Acura of Charleston	Charleston
McElveen Chevrolet, LLC	Mt. Pleasant
Miller Cadillac, Inc.	Mt. Pleasant
Morris Nissan	Charleston
Northside Nissan	N. Charleston
Palmetto Ford	Mt. Pleasant
Palmetto Ford, Inc.	Charleston
Ravenel Ford, Inc.	Ravenel
Rick Hendrick Chevrolet	Charleston
Rick Hendrick Dodge	Charleston
Rick Hendrick Jeep-Chr	N. Charleston
Rick Hendrick's Import Showplace	Charleston
Saturn of Charleston	N. Charleston
Stokes Honda North	N. Charleston
Stokes Isu-Kia-Sub	N. Charleston
Stokes Volkswagen	N. Charleston
Strom Altman Dodge	N. Charleston
Victory Hyundai of Charleston	Charleston
West Ashley Toyota, Inc.	Charleston

-Cherokee-

Burns Che-Chr-Dod-Jee, Inc.	Gaffney
Joe Gibson Suzuki	Gaffney
Roger Shiflett Ford, Inc.	Gaffney
Wallace White Pon-Bui-GMC	Gaffney

-Chester-	
Nourse Chester Automotive	Chester
Nourse Motors of Chester, LLC	Chester
-Chesterfield-	
Bennett Motor Co., Inc.	Cheraw
John Donoghue Ford, Inc.	Cheraw
Lawrence Chevrolet-Pontiac	Pageland
-Clarendon-	
Prothro Che-Bui-Pon-GMC Truck	Manning
Stokes-Craven Chr-Jeep-Dodge	Manning
Stokes-Craven Ford	Manning
-Colleton-	
Peters Pontiac Buick-GMC	Walterboro
Rizer Chevrolet Co., Inc.	Walterboro
Walterboro Motor Sales Co.	Walterboro
-Darlington-	
Action Ford-Mercury, Inc.	Hartsville
John Newsome, Inc,	Hartsville
Raceway Chrysler-Jeep-Dodge, Inc.	Hartsville
Raceway Ford	Darlington
-Dorchester-	
Bilton Che-Pon-GMC Truck	St. George
Carolina International Trucks LLC	Summerville
Hoover Chrysler-Dodge, Inc.	Summerville
Jim Bilton Ford, Inc.	St. George
Marathon Chevrolet	Summerville
Stokes Mazda, Inc.	N. Charleston
Summerville Ford-Mercury, Inc.	Summerville

-Edgefield-	
Herlong Pon-Che-Bui, Inc.	Johnston
Jim Satcher, Inc.	Johnston
Pendarvis Chevrolet Co., Inc.	Edgefield
Yonce Ford-Mercury, Inc.	Edgefield
-Fairfield-	
Wilson Chevrolet Olds, Inc.	Winnsboro
Wilson Chr-Dod-Jee, Inc.	Winnsboro
-Florence-	
Auddie Brown Mitsubishi	Florence
Cale Yarborough Honda, Inc.	Florence
Carolina International Trucks - Florence	Florence
Efird Chry-Jeep-Dodge, Inc.	Florence
Florence Mack, Inc.	Florence
Florence Toyota	Florence
Floyd Motor Co., Inc.	Lake city
Home Ford, Inc.	Florence
Kia of Florence	Florence
King Cad-Bui-Pon-GMC-Truck, Inc.	Florence
Lake City Ford-Mercury, LLC	Lake City
Palmetto Nissan	Florence
Peterbilt of Florence	Florence
Raceway Chevrolet-Pontiac-Buick-GMC	Lake City
Saturn of Florence	Florence
Service Motor Company, Inc.	Pamplico
-Georgetown-	
Coastal Nis-Che-Cad	Pawleys Island
Hemingway Motor Co., Inc.	Andrews
Parrish Motor Co., Inc.	Georgetown

Tidelands Chrysler Dodge	Pawleys Island
Tidelands Ford-Lincoln-Mercury	Pawleys Island
-Greenville-	
BMS, Inc. d/b/a Breakaway Honda	Greenville
Benson Chr-Dod-Jee, Inc.	Greer
Big O Dodge of Greenville, Inc.	Greenville
Bradshaw Acura	Greenville
Brockman Automotive	Greenville
Carlton Motorcars, Inc.	Greenville
Carolina International Trucks-Gville	Greenville
Cherokee Kenworth, Inc.	Greenville
Christopher Trucks, Inc.	Greenville
Crown Jeep-Chrysler	Greenville
Crown Nissan Greenville	Greenville
D & D Motors, Inc.	Greer
Dick Smith Mitsubishi	Greenville
Fairway Ford, Inc.	Greenville
Fairway Motorcars, LLC	Greenville
George Coleman Ford, Inc.	Travelers Rest
Heritage Lincoln-Mercury	Greenville
John Finger Mazda	Greenville
Kevin Whitaker Che-Cad	Greenville
Kevin Whitaker Chevrolet, Inc.	Greenville
Land Rover Greenville	Greenville
Saturn of Greenville	Greenville
Simpsonville Chevrolet, Inc.	Simpsonville
Sitton Buick-Pon-GMC Truck, Inc.	Greenville
Steve White Motors of SC, Inc.	Greenville
Stokes-Trainor Ford	Simpsonville
Toyota of Greenville	Greenville

-Greenwood-	
C. Thompson Automotive	Greenwood
Gary Russ Chev-Cadillac, Inc.	Greenwood
George Ballentine Ford-Lin-Mer	Greenwood
Quality Chrysler City	Greenwood
-Hampton-	
Brunson Automobile Sales, Inc.	Hampton
Tison Motor Co., Inc.	Estill
-Horry-	
Addy's Harbor Dodge	Myrtle Beach
Atlantic Chrysler-Jeep-Dodge	Loris
Atlantic Ford, Inc.	Loris
Beach Ford-Lin-Mer-Volvo, Inc.	Myrtle Beach
Bell & Bell Pon-GMC, Inc.	N. Myrtle Beach
Conway Chr-Dodge-Jeep, Inc.	Conway
Conway Ford, Inc.	Conway
Diamond Automotive Group, Inc.	Conway
East Coast Honda	Myrtle Beach
East Coast Volkswagen	Myrtle Beach
Fowler Motors	Conway
Grand Strand Nissan, Inc.	Myrtle Beach
Hadwin-White Pon-Bui-GMC-Sub	Conway
Jud Kuhn Chevrolet	Little River
Kia of Myrtle	Myrtle Beach
Lay-Fisher Chev. Inc.	Loris
Myrtle Beach Chevrolet, Inc.	Myrtle Beach
Myrtle Beach Chrysler-Jeep, Inc.	Myrtle Beach
Myrtle Beach Hyundai-Isuzu	Myrtle Beach
Myrtle Beach Suzuki	Myrtle Beach
Palmetto Cherolet Co., Inc.	Conway
Sparks Toyota, Inc.	Myrtle Beach
Sun Coast Mazda-Mitsubishi	Conway
Suzuki Outlet of Myrtle Beach	Myrtle Beach

-Jasper-	
Hilton Head Chrysler Jeep Dodge	Hardeeville
Hilton head Hyundai	Hardeeville
Key Inifiniti LLC	Hardeeville
Key Mazda	Hardeeville
Key Nissan, LLC	Hardeeville
Porsche of Hilton Head	Hardeeville
Prestige Motorcars, LLC dba Hilton Head Jaguar	Hardeeville
-Kershaw-	
Dick Smith Pon-Chr-Dod-GMC-Jee	Lugoff
Heritage Che-Bui, Inc.	Camden
James Ervin Toyota	Lugoff
Redteam Motor Co., Inc.	Lugoff
-Lancaster-	
Burns Ford-Mercury, Inc.	Lancaster
Elrod Pontiac-Buick-Chrysler, Inc.	Lancaster
H & H Chevrolet, Inc.	Kershaw
Lancaster Dodge-Chrysler-Jeep	Lancaster
Lancaster Motor Co.	Lancaster
-Laurens-	
Baldwin Pon-Bui-GMC, Inc.	Laurens
Cooper Ford, Inc.	Clinton
Firmin Ford, Inc.	Laurens
John Foster Motors, Inc.	Laurens
Lynn Cooper, Inc.	Clinton
Smith Chev-Cad, Inc.	Laurens

-Lexington-	
Addy Dodge, Inc.	Lexington
Ben Satcher Motors, Inc.	Lexington
Cherokee Kenworth	West Columbia
Columbiana Chevrolet-Hummer	Columbia
Dick Smith Infiniti, Inc.	Columbia
Dick Smith Nissan of Lexington	Lexington
Dick Smith Nissan, Inc.	Columbia
Hampton Automotive, Inc.	Columbia
Midlands Honda	W. Columbia
Saturn of Columbia, Inc.	Columbia
Stivers Chrysler-Jeep, Inc.	Lexington
Toyota Center	W. Columbia
Twin City Motor Co., Inc.	Batesburg
-Marion-	
Mullins Motors, Inc.	Mullins
Pee Dee Ford Lincoln Mercury, Inc.	Mullins
-Marlboro-	
Griffin-Flythe Chevrolet, Inc.	Bennettsville
Meggs Ford-Chry-Dodge-Jeep	Bennettsville
-Newberry-	
Cromley's Inc.	Newberry
Jeffrey Dean Chr Dod Jee GMC	Newberry
Kirby Schrader	Whitmire
Stokes-Trainor Che-Old-Pon-Cad Bui	Newberry
-Oconee-	
Bobby Wood Chevrolet-Pontiac	West Union
Edwards Auto Sales, Inc.	Walhalla
Lake Keowee Chrysler-Dodge LLC	Seneca

Leader Ford	Seneca
Performance Chevrolet-Buick-GMC	Seneca

-Orangeburg-

Al Bilton Ford-Mercury, Inc.	Holly Hill
Bilton-Behr Chevrolet, Inc.	Holly Hill
Bob Richards Automotive, LLC	Orangeburg
Falrey Chevrolet-Cadillac	Orangeburg
Orangeburg Chr-Dod-Nis. Inc.	Orangeburg
Orangeburg Ford	Orangeburg
Superior Honda	Orangeburg
Superior Motors, Inc.	Orangeburg

-Pickens-

Benson Ford-Mercury, Inc.	Easley
Crane Chev-Cad, Inc.	Easley
Easley Mitsubishi	Easley
Easley Pon-Bui-GMC Truck, Inc.	Easley
Hendrick Honda	Easley
McKinney Dod-Chr-Ply-Jeep	Easley
Norris Ford, Inc.	Pickens
Tinsley Chevrolet Co., Inc.	Pickens
Toyota of Easley, Inc.	Easley

-Richland-

Bob Bennett Ford, Inc.	Columbia
Capitol Chevrolet	Columbia
Capitol Hyundai	Columbia
Carolina International Trucks-Cola	Columbia
Columbia Freightliner, LLC	Columbia
Dick Dyer Toyota	Columbia
Dick Smith Motors	Columbia
Dodgeland of Columbia	Columbia
Galeana Chrysler-Kia	Columbia

Hancock Motor co.	Columbia
Hancock Volkswagen	Columbia
Honda Cars of Columbia	Columbia
Jim Hudson Lexus Columbia	Columbia
Jim Hudson Mitsubishi	Columbia
Jim HudsonPontiac-GMC-Saab	Columbia
Jim Hudson Toyota	Irmo
Jim Moore Cadillac, Inc.	Columbia
McDaniels Acura-Porsche	Columbia
Pulliam Motor Co.	Columbia
Shealy's Truck Center-Cola	Columbia
Stivers Lincoln-Mercury	Columbia
Wray Automotive, Inc.	Columbia

-Saluda-

Cromley's Inc.	Newberry
Saluda Motor Sales, Inc.	Saluda

-Spartanburg-

Benson Cad-Nis, Inc.	Spartanburg
Bradshaw Automotive Group	Greer
Dave Edwards Toyota	Spartanburg
Dick Brooks Honda	Greer
Farrell Chevrolet-Kia	Spartanburg
Foothills Ford of Chesnee	Chesnee
Joe Gibson Mitsubishi	Spartanburg
Kia of Greer	Greer
Saturn of Spartanburg	Spartanburg
Shealy's Truck Center	Duncan
Spartanburg Chrysler-Jeep	Spartanburg
Spartanburg Dodge, Inc.	Spartanburg
Toyota of Greer	Greer
Vic Bailey Ford, Inc.	Spartanburg
Vic Bailey Honda	Spartanburg
Vic Bailey Lincoln-Mercury, Inc.	Spartanburg
Vic Bailey Volkswagen	Spartanburg

Wakefield Buick-Pontiac-GMC, Inc.	Spartanburg
Woodruff Chevrolet	Woodruff
-Sumter-	
Bilton Lincoln-Mercury	Sumter
Boyle Motor Company	Sumter
Boyle Toyota, Inc.	Sumter
Goodwin Buick-Jeep	Sumter
Goodwin Honda-Mitsubishi-VW	Sumter
Jones Chevrolet Co.	Sumter
Jones Nissan, Inc.	Sumter
Jones Pontiac-GMC Truck, Inc.	Sumter
McLaughlin Motors, Inc.	Sumter
Sumter Chr-Ply-Dodge	Sumter
-Union-	
Union Chrysler-Dodge-Jeep, Inc.	Union
-Williamsburg-	
Big Country Chevrolet, Inc.	Hemingway
Haselden Brothers, Inc.	Hemingway
Longstreet Che-Bui-Cad-GMC	Kingstree
-York-	
Burris Chevrolet-Cadillac, Inc.	Rock Hill
Carolina Mazda	Rock Hill
Clinton Family Ford-Lin-Mer	Rock Hill
Dickerson Motor Co., Inc.	York
Dunlap-Johnson Chevrolet Co., Inc.	York
Fort Mill Ford, Inc.	Fort Mill
Fred Caldwell's Clover Chevrolet	Clover
Good Motor Company	Rock Hill
Griffin Mitsubishi	Rock Hill
Griffin Pontiac-Buick-GMC	Rock Hill

Harrelson Nissan	Rock Hill
Harrelson Toyota	Rock Hill
Honda Cars of Rock Hill	Rock Hill
Rick Ford, Inc.	Clover
Stateline Chrysler Jeep Dodge Inc.	Fort Mill

Pursuant to § 30-4-30, please fulfill this requests [sic] within 15 days upon receipt of this correspondence.

Thank you for your assistance in this matter. If you should have any questions, please do not hesitate to contact me.

With warm personal regards, I am

Sincerely,

/s/ Richard A. Harpootlian
Richard A. Harpootlian

/hmh

Richard A. Harpootlian, P.A.
Attorneys At Law
P.O. Box 1090
1410 Laurel Street
Columbia, South Carolina 29202

Richard A. Harpootlian Telephone (803) 252-4848
rah@harpootlianlaw.com Facsimile (803) 252-4810

January 19, 2007

VIA ELECTRONIC MAIL & U.S. MAIL

Beth Parks
SC Department of Motor Vehicles
Freedom of Information Act Request
Post Office Box 1489
Blythewood, South Carolina 29016-1498

Dear Ms. Parks:

This is a Freedom of Information request pursuant to SC Code Ann. § 30-4-30, and to the exception in 18 USC § 2721(b)(4) of the Driver's Privacy Protection Act of 1994.

Please provide the following information pursuant to this request:

> Private purchases of new or used automobiles during the weeks of June 1, 2006 through September 2, 2006, including the name, address, and telephone number of the buyer, the type of vehicle purchased and the date of the purchase for the following South Carolina dealerships:
>
> - Atlantic Chrysler Jeep Dodge
> - Brockman Automotive
> - Burns Ford Mercury
> - Fairway Ford, Inc. [Received (Illegible)]

- Fairway Motorcars, Inc.
- Gene Reed Imports
- Herlong Pontiac Chevrolet Buick
- Hilton Head Chrysler Jeep Dodge
- Hilton Head Chrysler Jeep Dodge
- Hilton Head Hyundai
- John Donoghue Ford, Inc.
- Low Country Mazda
- Morris Nissan
- Peterbilt of Florence
- Planet Ford
- Rick Hendrick Jeep Eagle
- Rich Hendrick Import Showplace
- Spartanburg Dodge
- Statleine Chrysler Jeep
- Steve White Motors
- Stokes Motor Company
- Myrtle Beach Suzuki
- Upstate Automotive Isuzu Kia
- Upstate Automotive Mitsubishi

If you should have any questions, please give me a call.

With warm regards, I am

Sincerely,

/s/ Richard A. Harpootlian
Richard A. Harpootlian

RAH:hmh
cc: (*via U.S. Mail only*)
A. Camden Lewis, Esquire
Brady Thomas, Esquire
Gedney M. Howe, III, Esquire
Michael E. Spears, Esquire

Richard A. Harpootlian, P.A.
Attorneys At Law
P.O. Box 1090
1410 Laurel Street
Columbia, South Carolina 29202

Richard A. Harpootlian
rah@harpootlianlaw.com
Telephone (803) 252-4848
Facsimile (803) 252-4810

January 22, 2007

VIA ELECTRONIC MAIL & U.S. MAIL

Beth Parks
SC Department of Motor Vehicles
Freedom of Information Act Request
Post Office Box 1489
Blythewood, South Carolina 29016-1498

Dear Ms. Parks:

This is a Freedom of Information Act request pursuant to SC Code Ann. § 30-4-30, and to the exception in 18 USC § 2721(b)(4) of the Driver's Privacy Protection Act of 1994.

Please provide the following information pursuant to this request:

> Private purchases of new or used automobiles during the weeks of June 1, 2006 through September 2, 2006, including the name, address, and telephone number of the buyer, type of vehicle purchased and the date of the purchase for the following South Carolina dealerships:
>
> - Dick Smith motors, Inc.
> - Galeana Chrysler Plymouth, Inc.
> - John Finger Motors, Inc.

- Stokes Automotive
- Stokes Craven Automotive, Inc.
- Stokes Trainor Chevrolet Oldsmobile Pontiac Cadillac
- Suzuki Outlet of Myrtle Beach

If you should have any questions, please give me a call.

Sincerely,

/s/ Richard A. Harpootlian
Richard A. Harpootlian

RAH:hmh
cc: A. Camden Lewis, Esquire (*via U.S. Mail only*)
Brady Thomas, Esquire (*via U.S. Mail only*)
Gedney M. Howe, III, Esquire (*via U.S. Mail only*)
Michael E. Spears, Esquire (*via U.S. Mail only*)

[Received (Illegible)]

Richard A. Harpootlian, P.A.
Attorneys At Law
P.O. Box 1090
1410 Laurel Street
Columbia, South Carolina 29202

Richard A. Harpootlian
rah@harpootlianlaw.com
Telephone (803) 252-4848
Facsimile (803) 252-4810

January 23, 2007

VIA ELECTRONIC MAIL & U.S. MAIL

Beth Parks
SC Department of Motor Vehicles
Freedom of Information Act Request
Post Office Box 1489
Blythewood, South Carolina 29016-1498

Dear Ms. Parks:

This is a Freedom of Information Act request pursuant to SC Code Ann. § 30-4-30, and to the exception in 18 USC § 2721(b)(4) of the Driver's Privacy Protection Act of 1994.

Please provide the following information pursuant to this request:

> Private purchases of new or used automobiles during the weeks of September 1, 2005 through September 14, 2005, and December 10, 2005 through December 24, 2005, including the name, address, and telephone number of the buyer, the name of the South Carolina dealership which the new or used automobile was purchased, and the date of the purchase.

Pursuant to § 30-4-30, please fulfill this requests [sic] within 15 days upon receipt of this correspondence.

Thank you in advance for you assistance in this matter. If you should have any questions, please do not hesitate to contact me.

With warm personal regards, I am

Sincerely,

/s/ Richard A. Harpootlian
Richard A. Harpootlian

/hmh

[Received Jan. 26, 2007]

LAW OFFICES
LEWIS & BABCOCK, L.L.P
POST OFFICE BOX 11208
COLUMBIA, SOUTH CAROLINA 29211
Telephone: 803/771-8000
Fax: 803/733-3534
Internet: brt@lewisbabcock.com

A. Camden Lewis
Keith M. Babcock
Mary G. Lewis
Ariail E. King
Peter D. Protopapas
Brady R. Thomas

Street Address:
1513 Hampton Street
Columbia, South Carolina 29201

January 9, 2007

Office of the Disciplinary Counsel
The Supreme Court of South Carolina
Post Office Box 12159
Columbia, SC 29211

To Whom It May Concern:

Enclosed please find a check for $50.00 and a copy of a letter for filing pursuant to Rule 7.3 of the Rules of Professional Conduct. This letter is a representative copy and was sent to the persons listed on the enclosed CD. The letters were mailed on January 4, 2007 by the Law Offices of Michael E. Spears, PA; Gedney M. Howe, III, PA; Richard A. Harpootlian, PA; and Lewis & Babcock, L.L.P.

Please contact me if you have any questions or concerns.

Sincerely,

LEWIS & BABCOCK, L.L.P.

/s/ Brady R. Thomas
Brady R. Thomas

cc: Michael E. Spears, Esquire
Gedney M. Howe, III, Esquire
Richard A. Harpootlian, Esquire

[Received
Jan 10 2007]

From the Law Firms of

Michael Spears, PA
Michael E. Spears
Post Office 5806
Spartanburg, SC 29304
(864) 583-3235

Gedney M. Howe, III, PA
Gedney M. Howe, III
Post Office Box 1034
Charleston, SC 29402
(843) 722-8948

Richard A. Harpootlian, PA
Richard A. Harpootlian
P.O. Box 1090
Columbia, SC 29202
(803) 525-4848

Lewis & Babcock, L.L.P.
A. Camden Lewis
Post Office Box 11208
Columbia, SC 29211
(803) 771-8000

ADVERTISING MATERIAL

January 3, 2007

[Redacted]
[Redacted]
[Redacted]

Dear [Redacted]

We represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee". We believe that these fees are being charged in violation of South Carolina law.

We understand that you may have been charged one of these fees on your recent purchase of an automobile. *We obtained this information in response to a Freedom of Information Act request to the South Carolina Department of Motor Vehicles.*

The exact nature of your legal situation will depend on facts not known to us at this time. You should understand that the advice and information in

this communication is general and that your own situation may vary. However, we would like the opportunity [sic] discuss your rights and options with you in a free consultation. If you are interested in participating in the case or in a free consultation, please mail the enclosed postage paid card and we will contact you soon.

You may wish to consult your lawyer or another lawyer instead of us. You may obtain information about other lawyers by consulting the Yellow Pages or by calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer.

Sincerely,

/s/ A. Camden Lewis
A. Camden Lewis

ANY COMPLAINTS ABOUT THIS LETTER OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO COMMISSION ON LAWYER CONDUCT, POST OFFICE BOX 11330, COLUMBIA, SOUTH CAROLINA, 29211 - TELEPHONE NUMBER 803-734-2038

PLEASE COMPLETE THE FOLLOWING:

NAME: _____ DATE: _____

ADDRESS: _____

_____

TELEPHONE#: _____

DEALERSHIP: _____

TYPE OF CAR: _____

ADMINISTRATIVE FEE OR PROCESSING FEE: $ _____
(Amount as shown on invoice)

DATE OF PURCHASE: ____

I am interested in participating.
SIGNATURE: _____

LEWIS & BABCOCK, L.L.P.
Attention: A. Camden Lewis, Esquire
1513 Hampton Street
Columbia, South Carolina 29201

PLEASE COMPLETE THE FOLLOWING:

NAME: _____ DATE: _____

ADDRESS: _____

_____

TELEPHONE#: _____

DEALERSHIP: _____

TYPE OF CAR: _____

ADMINISTRATIVE FEE OR PROCESSING FEE: $ _____ (Amount as shown on invoice)

DATE OF PURCHASE: ____

I am interested in participating.

SIGNATURE: _____

LEWIS & BABCOCK, L.L.P.
Attention: A. Camden Lewis, Esquire
1513 Hampton Street
Columbia, South Carolina 29201

From the Law Firms of

Michael Spears, PA
Michael E. Spears
Post Office 5806
Spartanburg, SC 29304
(864) 583-3235

Gedney M. Howe, III, PA
Gedney M. Howe, III
Post Office Box 1034
Charleston, SC 29402
(843) 722-8048

Richard A. Harpootlian, PA
Richard A. Harpootlian
P.O. Box 1090
Columbia, SC 29202
(803) 252-4848

Lewis & Babcock, L.L.P.
A. Camden Lewis
Post Office Box 11208
Columbia, SC 29211
(803) 771-8000

ADVERTISING MATERIAL

January 23, 2007

[Redacted]
[Redacted]
[Redacted]

Dear [Redacted]

We represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee". We believe that these fees are being charged in violation of South Carolina law.

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Sincerely,

/s/ A. Camden Lewis
A. Camden Lewis

ANY COMPLAINTS ABOUT THIS LETTER OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO COMMISSION ON LAWYER CONDUCT, POST OFFICE BOX 11330, COLUMBIA, SOUTH CAROLINA, 29211 - TELEPHONE NUMBER 803-734-2038

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Law Offices
LEWIS & BABCOCK, L.L.P
1513 Hampton Street
Post Office Box 11206
Columbia, South Carolina 29211

Advertising Material
540
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29936+7426-98 R003 [Barcode]

Envelope

[Front of Insert Card]

PLEASE COMPLETE THE FOLLOWING:

NAME: _____ DATE: _____

ADDRESS: _____

_____

TELEPHONE#: _____

DEALERSHIP: _____

TYPE OF CAR: _____

ADMINISTRATIVE FEE OR PROCESSING FEE: $ _____
(Amount as shown on invoice)

DATE OF PURCHASE: ____

I am interested in participating.
SIGNATURE: _____

[Back of insert card]

LEWIS & BABCOCK, L.L.P.
Attention: A. Camden Lewis, Esquire
1513 Hampton Street
Columbia, South Carolina 29201

From the Law Firms of

Michael Spears, PA
Michael E. Spears
Post Office 5806
Spartanburg, SC 29304
(864) 583-3535

Gedney M. Howe, III, PA
Gedney M. Howe, III
Post Office Box 1034
Charleston, SC 29402
(843) 722-8048

Richard A. Harpootlian, PA
Richard A. Harpootlian
P.O. Box 1090
Columbia, SC 29202
(803) 252-4848

Lewis & Babcock, L.L.P
A. Camden Lewis
Post Office Box 11208
Columbia, SC 29211
(803) 771-8000

ADVERTISING MATERIAL

March 1, 2007

To Whom It May Concern,

We represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee". We believe that these fees are being charged in violation of South Carolina law.

We understand that you may have been charged one of these fees on your recent purchase of an automobile. *We obtained this information in response to a Freedom of Information Act request to the South Carolina Department of Motor Vehicles.*

The exact nature of your legal situation will depend on facts not known to us at this time. You should understand that the advice and information in this communication is general and that your own

situation may vary. However, we would like the opportunity [sic] discuss your rights and options with you in a free consultation. If you are interested in participating in the case or in a free consultation, please mail the enclosed postage paid card and we will contact you soon.

You may wish to consult your lawyer or another lawyer instead of us. You may obtain information about other lawyers by consulting the Yellow Pages or by calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer.

Sincerely,

/s/ A. Camden Lewis
A. Camden Lewis

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Lewis & Babcock, L.L.P.
A. Camden Lewis
Post Office Box 11208
Columbia, SC 29211
(803) 771-8000

ADVERTISING MATERIAL

March 5, 2007

[Redacted]
[Redacted]
[Redacted]

Dear [Redacted]

We represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee". We believe that these fees are being charged in violation of South Carolina law.

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Sincerely,

/s/ A. Camden Lewis
A. Camden Lewis

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1513 Hampton St.
Columbia, SC 29201

Advertising Material

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[Redacted]
[Redacted]
[Redacted]

PLEASE COMPLETE THE FOLLOWING:

NAME: _____DATE:_____

ADDRESS: _____

_____

TELEPHONE#: _____

DEALERSHIP: _____

TYPE OF CAR: _____

ADMINISTRATIVE FEE OR PROCESSING FEE: $ _____ (Amount as shown on invoice)

DATE OF PURCHASE: ____

I am interested in participating.

SIGNATURE: _____

LEWIS & BABCOCK, L.L.P.
Attention: A. Camden Lewis, Esquire
1513 Hampton Street
Columbia, South Carolina 29201

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Lewis & Babcock, L.L.P
A. Camden Lewis
Post Office Box 11208
Columbia, SC 29211
(803) 771-8000

[Received
May 09, 2007]

ADVERTISING MATERIAL

March 8, 2007

Dear Sir/Madam:

We represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee". We believe that these fees are being charged in violation of South Carolina law.

We understand that you may have been charged one of these fees on your recent purchase of an automobile. *We obtained this information in response to a Freedom of Information Act request to the South Carolina Department of Motor Vehicles.*

The exact nature of your legal situation will depend on facts not known to us at this time. You should understand that the advice and information in

this communication is general and that your own situation may vary. However, we would like the opportunity [sic] discuss your rights and options with you in a free consultation. If you are interested in participating in the case or in a free consultation, please mail the enclosed postage paid card and we will contact you soon.

You may wish to consult your lawyer or another lawyer instead of us. You may obtain information about other lawyers by consulting the Yellow Pages or by calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer.

Sincerely,

/s/ Richard A. Harpootlian
Richard A. Harpootlian

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J. GREGORY STUDEMEYER
A Professional Corporation
Attorney at Law

1804 Bull Street
Post Office Box 12201
Columbia, South Carolina
29211-2201

Tel: (803) 779-3363
Fax: (803) 779-3364

March 7, 2007

A. Camden Lewis, Esq.
Lewis & Babcock, LLP
Post Office Box 11208
Columbia, SC 29211

Re: *Herron, et al. v. CarMax, et al.*
Civil Action No.: 2006-CP-02-1230

Dear Mr. Lewis:

I represent several of the Defendants in this case.

It is my understanding that one of your co-counsel has made a series of requests under the Freedom of Information Act (FOIA) to the South Carolina Department of Motor Vehicles (SCDMV) for information relating to purchases of new and used vehicles. Each of these requests claim an exception under 18 U.S.C. § 2721 (b)(4) of the Driver's Privacy Protection Act of 1994.

It is also my understanding that you have sent a series of letters to purchases identified in the SCDMV's responses to these requests for information. These letters designated as **"ADVERTISING MATERIAL"** include the following provision in bold print:

> **. . . We obtained this information in response to a Freedom of Information Act request to the South Carolina Department of Motor Vehicles.**

S.C. Code Ann. § 30-2-50 (1976) provides in pertinent part:

> (A) A person or private entity shall not knowingly obtain or use any personal information obtained from a state agency for commercial solicitation directed to any person in the State.

It is my understanding that thousands of letters have been mailed to purchasers identified by SCDMV all across the state. This appears to be a direct violation of S.C. Code Ann. § 30-2-50.

Please provide me with a written explanation of your position within ten days of the date of this letter.

Sincerely,

/s/ J. Gregory Studemeyer
J. Gregory Studemeyer

JGS/lwf

LAW OFFICES
LEWIS & BABCOCK, L.L.P.
POST OFFICE BOX 11208
COLUMBIA, SOUTH CAROLINA 29211
Telephone: 803/771-8000
Fax: 803/733-3534
Internet: firm@lewisbabcock.com

A. Camden Lewis
Keith M. Babcock
Mary G. Lewis
Ariail E. King
Peter D. Protopapas
Brady R. Thomas

Street Address:
1513 Hampton Street
Columbia, South Carolina, 29201

February 16, 2007

J. Gregory Studemeyer, Esq.
Post Office Box 12201
Columbia, South Carolina 29211

Re: *Heather Herron, et al. v. CarMax Auto Superstores, Inc. et al.*
Civil Action No.: 2006-CP-02-1230
Our File No.: 06-551

Dear Mr. Studemeyer:

I am in receipt of your writing of March 7, 2007. As you well recognized, the Freedom of Information Act requests were made under the exception of 18 U.S.C. § 2721(b)(4). They were for the purpose of gaining information in litigation and making sure the car buyers had been illegally charged as we set forth in our Complaint. It is a lawyer's duty to make sure injured citizens understand their rights, and when

they have been secretly cheated to bring that to their attention if at all possible.

You have mentioned that the material we sent out was designed "ADVERTISING MATERIAL." As you know that is a requirement of the Disciplinary Counsel, and, as we predicted, we knew that your group would try to see if we had met the requirements of the Disciplinary Counsel. In an abundance of caution we followed the requirements.

You have now found out that we have met the requirements of Disciplinary Counsel. Thus, you have turned to S.C. Code § 30-2-50 (1976). A review of that statute and its companion statute, § 30-2-30, shows that what is prohibited is using the subject information to market a consumer product or service. We are not marketing or selling a consumer product or service. We also do not fall under your cited statute for several other reasons.

Please provide us with the names of the people to whom you have published your letter, whether shown as "cc," "pc," "bc," including all attorneys and support staff. Additionally, please verify that you are threatening an ethical or criminal charge in a civil case.

I hope this letter answers your questions.

Sincerely yours,

LEWIS & BABCOCK, LLP

/s/ A. Camden Lewis
A. Camden Lewis

ACL/kc

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Civil Action No.: 06-CP-1230

HEATHER HERRON, NATALIE ARMSTRONG, ALISON DANNERT, MICHAEL RITZ, JULIE FREEMAN, CHRISTINE WATTS, MICHAEL BLEASE, MICHAEL WATTS, Individually and for the Benefit of All Car Buyers Whom Paid "Administrative Fees" as Described Below to Defendants.

Plaintiffs,

CARMAX AUTO SUPERSTORES, INC.; DICK DYER & ASSOCIATES, INC., DICK SMITH MOTORS, INC.; GALEANA CHRYSLER JEEP, INC.; GALEANA CHRYSLER PLYMOUTH, INC.; PULLIAM MOTOR CO.; DICK SMITH INFINITI, INC.; DICK SMITH NISSAN OF LEXINGTON, INC.; DICK SMITH NISSAN, INC.; OVERLAND, INC. D/B/A LAND ROVER OF COLUMBIA; TOYOTA CENTER, LLC; STOKES AUTOMOTIVE, INC.; STOKES MOTORS, INC.; STOKES CRAVEN AUTOMOTIVE, INC.; STOKES MAZDA, INC.; PALMETTO CHEVROLET COMPANY, INC.; PALMETTO NISSAN, INC.; PALMETTO FORD, INC.; JONES FORD, INC., HAROLD ARNOLD'S SENTRY BUICK, INC.; J. L. H. INVESTMENTS, LP; RICK HENDRICK CHEVROLET, LP; RICK HENDRICK HONDA CARS, CO.; RICK HENDRICK, JEEP EAGLE, L.P.; OAK TREE, INC. D/B/A WEST ASHLEY TOYOTA, INC.; GENE REED IMPORTS, INC.; GENE REED TOYOTA, INC., HOOVER JEEP CHRYSLER, INC.; HOOVER MOTORS, INC.; HOOVER CHRYSLER DODGE, INC.; STROM ALTMAN DODGE, INC.; BAKER MOTOR COMPANY OF CHARLESTON, INC.;

MILLER CADILLAC, INC.; TAYLOR INVESTMENTS, INC. D/B/A TAYLOR TOYOTA; BENSON CHRYSLER PLYMOUTH, INC.; BENSON FORD MERCURY, INC.; BENSON CADILLAC NISSAN, INC.; BIG "O" DODGE OF GREENVILLE, INC.; BRADSHAW AUTOMOTIVE GROUP, INC.; SPARTANBURG CHRYSLER JEEP, INC.; KIA OF ANDERSON, LLC; TOYOTA OF GREENVILLE, INC., TOYOTA OF EASLEY, INC., FARRELL AUTOMOTIVE, INC.; FAIRWAY FORD, INC.; SATURN OF GREENVILLE INC.; STEVE WHITE MOTORS OF SOUTH CAROLINA, INC.; D & D MOTORS, INC.; BURNS CHRYSLER DODGE JEEP, LLC; JOHN FINGER MOTORS, INC.; SONIC AUTOMOTIVE, INC. D/B/A CENTURY BMW; BOB RICHARDS NISSAN; DICK SMITH CHRYSLER JEEP; GOODMAN CHEVROLET, INC.; HENNA CHEVROLET OLDS CADILLAC, LLC; HONDA CARS OF AIKEN; JOHNSON MOTOR COMPANY OF SC; SANDERS TRUCK SALES; CAROLINA FORD; CAROLINA INTERNATIONAL TRUCKS OF ANDERSON; CLINKSCALES CHEVROLET INC.; FAIRWAY FORD MAZDA; PIEDMONT CHRYSLER JEEP; PIEDMONT HONDA; PLANET FORD; RALPH HAYES TOYOTA, INC.; TOM HUNTER PONTIAC BUICK GMC, LLC; UPSTATE AUTOMOTIVE (CHEVROLET CADILLAC); UPSTATE AUTOMOTIVE (ISUZU KIA.); UPSTATE AUTOMOTIVE (MITSUBISHI); UPSTATE AUTOMOTIVE (NISSAN); GIBBES FORD, INC.; ZEIGLER CHEVROLET, INC.; B & B FORD, INC.; WHITTLE MOTOR COMPANY, INC.; BUTLER CHRYSLER DODGE JEEP; CAROLINA VOLVO; HILTON HEAD AUTOMOTIVE LLC; HILTON HEAD HONDA; LAND ROVER HILTON HEAD; MODERN CLASSIC MOTORS; O. C. WELCH FORD LINCOLN MERCURY; PARKS AUTOMOTIVE GROUP; PARKS CADILLAC; STOKES HONDA CARS OF BEAUFORT, INC.; STOKES MITSUBISHI; STOKES BROWN TOYOTA; DICK SMITH CHEVROLET, INC.; HOOVER JEEP CHRYSLER, INC.; HOOVER MOTORS, INC.; MCELVEEN PONTIAC BUICK GMC, INC.;

ALTMAN LINCOLN MERCURY HYUNDAI; CAROLINA INTERNATIONAL TRUCKS CHARLESTON; CHARLESTON MITSUBISHI; HENDRICK HONDA OF CHARLESTON; HOOVER CHRYSLER JEEP/INC.; HUGHES MOTORS, INC.; KIA COUNTRY; LEXUS OF CHARLESTON; LOW COUNTRY 1VIAZDA; LOW COUNTRY VOLKSWAGEN; MARATHON CHEVROLET OF N. CHARLESTON; MARCHANT CHEVROLET, INC.; MCDANIELS ACURA OF CHARLESTON; MCELVEEN CHEVROLET, LLC; MORRIS NISSAN; NORTHSIDE NISSAN; RAVENEL FORD; INC.; RICK HENDRICK DODGE; RICK HENDRICK'S IMPORT SHOWPLACE; SATURN OF CHARLESTON; STOKES HONDA NORTH CHARLESTON; STOKES ISUZU KIA SUBARU; STOKES VOLKSWAGEN; VICTORY HYUNDAI OF CHARLESTON; BURNS CHEVROLET CHRYSLER DODGE JEEP, INC.; JOE GIBSON SUZUKI; ROGER SHMLETT FORD, INC.; WALLACE WHITE PONTIAC BUICK GMC; NOURSE CHESTER AUTOMOTIVE; NOURSE MOTORS OF CHESTER LLC; BENNETT MOTOR CO., INC.; JOHN DONOGHUE FORD, INC.; LAWRENCE CHEVROLET PONTIAC; PROTHRO CHEVROLET BUICK PONTIAC GMC TRUCK; STOKES CRAVEN CHRYSLER JEEP DODGE; STOKES CRAVEN FORD; PETERS PONTIAC BUICK GMC; RIZER CHEVROLET CO., INC.; WALTERBORO MOTOR SALES CO.; ACTION FORD MERCURY, INC.; JOHN NEWSOME, INC.; RACEWAY CHRYSLER JEEP DODGE, INC.; RACEWAY FORD; CAROLINA INTERNATIONAL TRUCKS LLC; MARATHON CHEVROLET; SUMMERVILLE FORD MERCURY, INC.; HERLONG PONTIAC CHEVROLET BUICK, INC.; JIM SATCHER, INC.; YONCE FORD MERCURY, INC.; WILSON CHEVROLET OLDSMOBILE, INC.; WILSON CHRYSLER DODGE JEEP, INC.; AUDDIEE BROWN MITSUBISHI; CALE YARBOROUGH HONDA, INC.; CAROLINA INTERNATIONAL TRUCKS FLORENCE; EFIRD CHRYSLER JEEP DODGE, INC.; FLORENCE MACK, INC.; FLORENCE TOYOTA; FLOYD MOTOR CO., INC.; HORNE

FORD, INC.; KIA OF FLORENCE; KING CADILLAC BUICK PONTIAC GMC TRUCK, INC.; LAKE CITY FORD MERCURY, LLC; PETERBILT OF FLORENCE; RACEWAY CHEVROLET PONTIAC BUICK GMC; SATURN OF FLORENCE; SERVICE MOTOR COMPANY, INC.; COASTAL NISSAN CHEVROLET CADILLAC; HEMINGWAY MOTOR CO., INC.; PARRISH MOTOR CO., INC.; TIDELANDS CHRYSLER DODGE; TIDELANDS FORD LINCOLN MERCURY; BMS, INC. D/B/A BREAKAWAY HONDA; BRADSHAW ACURA; BROCKMAN AUTOMOTIVE; CAROLINA INTERNATIONAL TRUCKS GREENVILLE; CHEROKEE KENWORTH, INC.; CHRISTOPHER TRUCKS, INC.; CROWN JEEP CHRYSLER; CROWN NISSAN GREENVILLE; DICK SMITH MITSUBISHI; FAIRWAY FORD, INC.; FAIRWAY MOTORCARS LLC; GEORGE COLEMAN FORD, INC.; HERITAGE LINCOLN MERCURY; JOHN FINGER MAZDA; KEVIN WHITAKER CHEVROLET CADILLAC; KEVIN WHITAKER CHEVROLET, INC.; SIMPSONVILLE CHEVROLET, INC.; SITTON BUICK PONTIAC GMC TRUCK, INC.; STOKES TRAINOR FORD; C. THOMPSON AUTOMOTIVE; GARY RUSS CHEVROLET CADILLAC, INC.; GEORGE BALLENTINE FORD LINCOLN MERCURY; QUALITY CHRYSLER CITY; BRUNSON AUTOMOBILE SALES, INC.; TISON MOTOR CO., INC.; ADDY'S HARBOR DODGE; ATLANTIC CHRYSLER JEEP DODGE; ATLANTIC FORD, INC.; BEACH FORD LINCOLN MERCURY VOLVO, INC.; BELL & BELL PONTIAC GMC, INC.; CONWAY CHRYSLER DODGE JEEP, INC.; CONWAY FORD, INC.; DIAMOND AUTOMOTIVE GROUP, INC.; EAST COAST HONDA; EAST COAST VOLKSWAGEN; FOWLER MOTORS; GRAND STRAND NISSAN, INC.; HADWIN WHITE PONTIAC BUICK GMC SUBARU; HYATT BUICK GMC TRUCKS; JUD KUHN CHEVROLET; KIA OF MYRTLE BEACH; LAY FISHER CHEVROLET, INC.; MYRTLE BEACH CHEVROLET, INC.; MYRTLE BEACH CHRYSLER JEEP, INC.; MYRTLE BEACH HYUNDAI ISUZU; MYRTLE BEACH

SUZUKI; SPARKS TOYOTA, INC.; SUN COAST MAZDA MITSUBISHI; SUZUKI OUTLET OF MYRTLE BEACH SC; HILTON HEAD CHRYSLER JEEP DODGE; HILTON HEAD HYUNDAI; KEY INFINITI LLC; KEY MAZDA; KEY NISSAN, LLC; PORSCHE OF HILTON HEAD; PRESTIGE MOTORCARS; LLC DBA HILTON HEAD JAGUAR; DICK SMITH PONTIAC CHRYSLER DODGE GMC JEEP; HERITAGE CHEVROLET BUICK, INC.; JAMES ERVIN TOYOTA; REDFEARN MOTOR CO., INC.; BURNS FORD MERCURY, INC.; ELROD PONTIAC BUICK GMC, INC.; H & H CHEVROLET, INC.; LANCASTER DODGE CHRYSLER JEEP; LANCASTER MOTOR CO.; BALDWIN PONTIAC BUICK GMC , INC.; COOPER FORD, INC.; FIRMIN FORD, INC.; JOHN FOSTER MOTORS, INC.; LYNN COOPER, INC.; SMITH CHEVROLET CADILLAC, INC.; ADDY DODGE, INC.; CHEROKEE KENWORTH; HAMPTON AUTOMOTIVE, INC.; MIDLANDS HONDA; SATURN OF COLUMBIA, INC.; STIVERS CHRYSLER JEEP, INC.; TWIN CITY MOTOR CO., INC.; MULLINS MOTORS, INC.; PEE DEE FORD LINCOLN MERCURY INC.; GREF'FIN FLYTHE CHEVROLET, INC.; MEGGS FORD CHRYSLER DODGE JEEP; CROMLEY'S INC.; JEFFREY DEAN CHRYSLER DODGE JEEP GMC; KIRBY SCHRADER; STOKES TRAINOR CHEVROLET OLD PONTIAC CADILLAC BUICK; BOBBY WOOD CHEVROLET PONTIAC; EDWARDS AUTO SALES, INC.; LAKE KEOWEE CHRYSLER DODGE LLC; LEADER FORD; PERFORMANCE CHEVROLET BUICK GMC; BOB RICHARDS AUTOMOTIVE, LLC; FAIREY CHEVROLET CADILLAC; ORANGEBURG CHRYSLER DODGE NISSAN, INC.; ORANGEBURG FORD; SUPERIOR HONDA; SUPERIOR MOTORS, INC.; BENSON FORD MERCURY, INC.; CRANE CHEVROLET CADILLAC, INC.; EASLEY MITSUBISHI; EASLEY PONTIAC BUICK GMC TRUCK, INC.; HENDRICK HONDA; NORRIS FORD, INC.; TINSLEY CHEVROLET CO., INC.; BOB BENNETT FORD, INC.; CAPITOL CHEVROLET; CAPITOL HYUNDAI;

CAROLINA INTERNATIONAL TRUCKS COLA; COLUMBIA FREIGHTLINER, LLC; DODGELAND OF COLUMBIA; HANCOCK MOTOR CO.; HANCOCK VOLKSWAGEN; HONDA CARS OF COLUMBIA; JIM MOORE CADILLAC, INC.; MCDANIELS ACURA PORSCHE; SHEALY'S TRUCK CENTER COLA; STIVERS LINCOLN MERCURY; WRAY AUTOMOTIVE, INC.; CROMLEY'S INC.; SALUDA MOTOR SALES, INC.; DAVE EDWARDS TOYOTA; DICK BROOKS HONDA; FOOTHILLS FORD OF CHESNE; JOE GIBSON MITSUBISHI; KIA OF GREER; SATURN OF SPARTANBURG; SHEALY'S TRUCK CENTER; SPARTANBURG DODGE, INC.; VIC BAILEY FORD, INC.; VIC BAILEY HONDA; VIC BAILEY LINCOLN MERCURY, INC.; VIC BAILEY VOLKSWAGEN; WAKEFIELD BUICK PONTIAC GMC, INC.; BOYLE MOTOR COMPANY; BOYLE TOYOTA, INC.; GOODWIN BUICK JEEP; GOODWIN HONDA MITSUBISHI VW; JONES CHEVROLET CO.; JONES NISSAN, INC.; JONES PONTIAC GMC TRUCK, INC.; MCLAUGHLIN MOTORS, INC.; SUMTER CHRYSLER PLYMOUTH DODGE; UNION CHRYSLER DODGE JEEP, INC.; BIG COUNTRY CHEVROLET, INC.; HASELDEN BROTHERS, INC.; LONGSTREET CHEVROLET BUICK CADILLAC GMC; CAROLINA MAZDA; CLINTON FAMILY FORD LINCOLN MERCURY; DICKERSON MOTOR CO., INC.; DUNLAP JOHNSON CHEVROLET CO., INC.; FORT MILL FORD, INC.; FRED CALDWELL'S CLOVER CHEVROLET; GOOD MOTOR COMPANY; GRIFFIN MITSUBISHI; GRIFFIN PONTIAC BUICK GMC; HARRELSON NISSAN; HARRELSON TOYOTA; HONDA CARS OF ROCK HILL; RICK FORD, INC.; STATELINE CHRYSLER JEEP DODGE INC.; AND AGAINST ALL MOTOR VEHICLE DEALERS OWNED OR CONTROLLED BY DEFENDANTS AS DEFINED IN S.C. CODE ANN. §56 15 10(H).

FIRST AMENDED COMPLAINT
(Jury Trial Demanded)

* * * *

333. Defendants have conspired together in a common scheme designed to deceive all car buyers (the term "car" as used herein includes new and used cars, trucks, sport utility vehicles and automobiles of all kinds). These actions amount to concerted consumer fraud.

334. Each individual Defendant's conduct vis a vis' all consumers was the product of unfair misleading and/or unconscionable business practices.

335. Defendants have all engaged in a common practice of presenting/advertising car prices in a misleading manner. Defendants set and advertise a sticker price for cars and then in addition charge a second fee often referred to as an "administrative fee," a "recording and processing fee," "closing fee," "dealer documentation and closing fee" (collectively "administrative fees"). Defendants present and advertise the "administrative fees" in a misleading manner and/or in an effort to mislead car buyers. This practice is a deceptive way to secretly artificially raise the sticker price.

336. Defendants conduct is not unlike that found to be an unfair trade practice by an Ohio court in *Motzer Dodge Jeep Eagle, Inc. v. Ohio Attorney General*, 642 N.E.2d 20 (Oh.Ct.App. 1994).

337. Defendants' advertising is misleading because it fails to include/adequately disclose the fact that Defendants will be charging "administrative fees" that are in addition to the advertised price of the car.

338. Defendants' placement of the "administrative fees" dealer invoice is deceptive in that the fee is separate and distinct from the general overhead that

car buyers expect to be included within the sticker price for a car and that the set fee is mandatory.

339. The "administrative fees" are not separate and distinct from Defendants' general overhead expected to be included in the overhead and advertised price. Instead, the "administrative fees" are tricky and deceptive add-ons.

340. The "administrative fees" are presented to car buyers in a misleading manner because car buyers are mislead [sic] into believing that administrative fees are mandatory fees required to be paid on every car such as taxes and license fees.

341. The "administrative fees" are charged in addition to advertised and/or list prices for cars.

342. The "administrative fees" are deliberately placed as separate line items on Defendants' invoices along with mandatory fees such as taxes, tags, and title. This implies that the "administrative fees" like the payment of taxes, fees for tags and fees for obtaining title are separate set fees and that there is no option but to pay this fee with every car purchase.

343. Consequently, car buyers purchase cars based on the total sticker price and are misled into believing that any discount received is off the sticker price and that additional fees are a special mandatory fee.

344. If a customer inquires about the fee, Defendants' sales people say that the "administrative fee" is a standard fee that has to be included on every vehicle.

345. In 2000, the General Assembly enacted a very narrow exception for charging these illegal "administrative fees."

346. S.C. Code § 37-2-307 allows a dealership to do what would otherwise be illegal, charge "administrative fees," only if the dealership follows strict rules.

347. S.C. Code Ann. §37-2-307 requires that "administrative fees" be included in the advertised price, disclosed on the sales contract, and conspicuously displayed at the dealership.

348. In order to charge administrative fees, Defendants are also required to annually register with the Department of Consumer Affairs.

349. Defendants have not availed themselves of the limited exception in S.C. Code Ann. §37 2 307.

350. Even if Defendants had complied with S.C. Code Ann. §37-2-307, Defendants actions are in violation of S.C. Code Ann. §56-15-10 *et seq.*

351. In 2004, Defendant CarMax Auto Superstores, Inc. charged "administrative fees" and failed to register with the Department of Consumer Affairs as required by S.C. Code Ann. §37-2-307.

352. In 2003, 2004, 2005, and 2006, Defendant CarMax Auto Superstores, Inc. charged "administrative fees" and failed to separately register for each location in the State with the Department of Consumer Affairs Department of Consumer Affairs as required by S.C Code Ann. §37-2-307.

353. In 2005, Defendant Dick Smith Motors, Inc. charged "administrative fees" and failed to register for each location in the State with the Department of Consumer Affairs as required by S.C. Code Ann. §37-2-307.

354. In 2003, 2004, 2005, and 2006, Defendant Dick Smith Motors, Inc. charged "administrative fees" and failed to register for each location in the

State with the Department of Consumer Affairs as required by S.C. Code Ann. §37-2-307.

355. In 2003 and 2004, Defendant Pulliam Motor Co. charged "administrative fees" and failed to register with the Department of Consumer Affairs as required by S.C. Code Ann. §37-2-307.

356. In 2003, 2004, 2005, and 2006, Defendant Dick Smith Infiniti, Inc. charged "administrative fees." In 2005, Defendant Dick Smith Infiniti, Inc. failed to register with the Department of Consumer Affairs as required by S.C. Code Ann §37-2-307 and failed to file a registration specific to this entity in the years 2003, 2004 and 2006.

357. In 2003, 2004, 2005, and 2006, Defendant Dick Smith Nissan of Lexington, Inc. charged "administrative fees." In 2005, Defendant Dick Smith Nissan of Lexington, Inc. failed to register with the Department of Consumer Affairs as required by S.C. Code Ann. §37-2-307 and failed to file a registration specific to this entity in the years 2003, 2004 and 2006.

358. In 2003, 2004, 2005, and 2006, Dick Smith Nissan, Inc. charged "administrative fees." In 2005 Dick Smith Nissan, Inc, failed to register with the Department of Consumer Affairs as required by S.C. Code Ann. §37-2-307 and failed to file a registration specific to this entity in the years 2003, 2004 and 2006.

359. In 2003 and 2004, Defendant Overland Inc. d/b/a Land Rover of Columbia charged "administrative fees" and failed to register with the Department of Consumer Affairs as required by S.C. Code Ann. §37-2-307.

360. In 2003, 2004, 2005, and 2006, Defendant Toyota Center, LLC charged "administrative fees" and failed to register with the Department of Consumer Affairs as required by required by S.C. Code Ann. §37-2-307.

361. In 2003, 2004, 2005 and 2006, Defendant Stokes Motors, Inc. charged "administrative fees" and failed to file a registration specific to this entity with the Department of Consumer Affairs as required by S.C. Code Aim. §37-2-307.

362. In 2003, 2004, 2005 and 2006, Defendant Stokes-Craven Automotive Group, Inc. charged "administrative fees" and failed to file a registration with the Department of Consumer Affairs as required by S.C. Code Aim. §37-2-307.

363. In 2003, 2004, 2005 and 2006, Defendant Stokes Mazda, Inc. charged "administrative fees" and failed to file a registration specific to this entity with the Department of Consumer Affairs as required by S.C. Code Ann. §37-2-307.

364. In 2003, 2004, 2005, and 2006, Defendant Palmetto Chevrolet Company, Inc. charged "administrative fees" and failed to register with the Department of Consumer Affairs as required by S.C. Code Ann. §37-2-307.

365. In 2003, Defendant Palmetto Ford, Inc. charged "administrative fees" and failed to register with the Department of Consumer Affairs as required by S.C. Code Ann. §37-2-307.

366. In 2003, 2004, 2005, and 2006, Defendant Jones Ford, Inc. charged "administrative fees" and failed to register with the Department of Consumer Affairs as required by S.C. Code Ann. §37-2-307.

367. In 2006, Defendant Rick Hendrick Chevrolet, LP charged "administrative fees" and failed to register with the Department of Consumer Affairs as required S.C. Code Ann. §37-2-307.

368. In 2003, 2004, 2005, and 2006, Defendant Hoover-Chrysler Dodge, Inc. charged "administrative fees" and failed to register with the Department of Consumer Affairs as required S.C. Code Ann. §37-2-307.

369. In 2003, 2004, 2005 and 2006, Defendant Baker Motor Company of Charleston charged "administrative fees" and failed to register with the Department of Consumer Affairs as required S.C. Code Ann. §37-2-307.

370. In 2003, 2004, and 2005, Defendant Big "O" Dodge of Greenville, Inc. charged "administrative fees" and failed to register with the Department of Consumer Affairs as required by S.C. Code Ann. §37-2-307.

371. In 2003, 2004, 2005, and 2006, Defendant Spartanburg Chrysler Jeep Inc. charged "administrative fees" and failed to register with the Department of Consumer Affairs as required by S.C. Code Ann. §37-2-307.

372. In 2003, 2004, and 2005, Defendant Kia of Anderson, LLC charged "administrative fees" and failed to register with the Department of Consumer Affairs as required by S.C. Code Ann. §37-2-307.

373. In 2003, Defendant Farrell Automotive, Inc. charged "administrative fees" and failed to register with the Department of Consumer Affairs as required by S.C. Code Ann. §37-2-307.

374. Plaintiff Heather Herron purchased a 2003 Land Rover SUV from Land Rover of Columbia.

375. Plaintiff Herron's sales invoice includes a separate line item for "Recording & Processing Fees." The "Recording & Processing Fees" line item is pre-printed and deceptively placed with fees for SC Sales Tax, Title, and License. This Recording & Processing Fees is an "administrative fee" as described above.

376. Plaintiff Alison Dannert purchased a Nissan Murano from Defendant CarMax Auto Superstores, Inc. in Greenville, South Carolina.

377. Plaintiff Alison Dannert's sales invoice includes a separate line item for Dealer Documentation/ Processing Fee. This fee is pre-printed and deceptively placed with fees for tax, title and license. This Dealer Documentation/Processing Fee is an "administrative fee" as described above.

378. Plaintiff Natalie Armstrong purchased a 2002 Jeep Liberty from Galeana Chrysler-Jeep, Inc.

379. Defendant Galeana Chrysler-Jeep, Inc.'s sales invoice includes a separate line item for Admin. Fee. This Admin. Fee is an "administrative fee" as described above.

380. Plaintiff Michael Ritz purchased a Tacoma pickup truck from Defendant Taylor Investments, Inc. (d/b/a Taylor Toyota, Inc.).

381. Defendant Taylor Investments Inc.'s sales invoice includes a separate line item for Administrative Serves [sic] Fee. This Administrative Services Fee is an "administrative fee" as described above.

382. Plaintiff Julie Freeman purchased a 1999 Mazda from Defendant Rick Hendrick Honda Cars Co.

383. Defendant Rick Hendrick Honda Cars Co.'s sales invoice includes a separate line item for Procurement Fee. This Procurement Fee is an "administrative fee" as described above.

384. Plaintiff Christine Watts purchases a 2004 BMW from Defendant Sonic Automotive, Inc. d/b/a Century BMW.

385. Defendant Sonic Automotive, Inc. d/b/a Century BMW's Retail Buyer's Order includes a separate line item for Recording & Processing Fees. This Recording & Processing Fee is an "administrative fee" as described above.

386. Plaintiff Michael Blease purchased a 2002 Volvo from Defendant Dick Dyer & Associates, Inc.

387. Defendant Dick Dyer & Associates, Inc.'s Buyer's Order and Invoice includes a separate line item for Processing Fee. This Processing Fee is an "administrative fee" as described above

388. Plaintiff Michael Watts purchased a Toyota from Defendant Toyota of Greenville, Inc.

389. Defendant Toyota of Greenville, Inc.'s purchase order includes a separate line item for a Procurement Fee. This Procurement Fee is an "administrative fee" as described above.

390. Upon information and belief, Defendants each annually illegally make several hundred thousand dollars off the deceptive use and placement of the "administrative fee" line item and said illegal fees should be disgourged.

FOR A FIRST CAUSE OF ACTION

(Violations of S.C. Code Ann. §56-15-10 *et. seq.*)

391. The allegations set forth in the paragraphs above are incorporated herein as if set forth verbatim.

392. Defendants are motor vehicle dealers subject to Title 56 of the S.C. Code.

393. Defendants deceptive use of "administrative fees" is arbitrary, in bad faith and unconscionable and in violation of statute.

394. Defendants' use and presentation of the administrative fees is designed to deceive and/or mislead car buyers and is thus is arbitrary, in bad faith and unconscionable and in violation of statute.

395. Defendants failure to adequately disclose and/or include "administrative fee" in the advertised price of cars constitutes misleading advertising in violation of statute.

396. Defendants conspired together to all apply similar administrative fees in an effort to cause damage to South Carolina car buyers. This conspiracy in and of itself is a violation of statute.

397. This suit is brought pursuant to S.C. Code Ann. §56-15-110(2) for the benefit of the whole because the action is one of common general interest to many persons and the parties are numerous and it is impracticable to bring them all before the Court

398. Accordingly, Plaintiffs are suing for the benefit of all South Carolina car buyers whom paid administrative fees to Defendants and against all motor vehicle dealers owned or controlled by Defendants as defined in S.C. Code Ann. §56-15-10(h).

399. Plaintiffs and all South Carolina car buyers whom paid administrative fees to Defendants in the past four years have been injured by Defendants deceptive acts as described above.

400. As a result of the aforementioned conduct of Defendants, Plaintiffs are entitled to double actual

damages, the cost of the suit and a reasonable attorney's fee pursuant to S.C. Code Ann. §56-15-110(1).

401. Furthermore, the aforementioned conduct of Defendants was malicious. Thus, Plaintiffs are entitled to punitive damages in the amount of three times the actual damages pursuant to S.C. Code Ann. §56-15-110(1).

FOR A SECOND CAUSE OF ACTION

(Civil Conspiracy as to Defendants Dick Smith Motors, Inc., Pulliam Motor Co., Dick Smith Infiniti, Inc,, Dick Smith Nissan o f Lexington, Inc.., Dick Smith Nissan, Inc., Overland, Inc. d/b/a Land Rover of Columbia, Toyota Center, LLC, Stokes Automotive, Inc., Stokes Motors, Inc., Stokes-Craven Automotive, Inc., Stokes Mazda Inc., Palmetto Chevrolet Company, Inc., Palmetto Nissan, Inc., Palmetto Ford, Inc., Jones Ford, Inc., Harold Arnold's Sentry Buick, Inc., J. L. Investments, LP, Rick Hendrick Chevrolet, LP, Rick Hendrick Jeep Eagle, L.P., Oak Tree Inc. d/b/a West Ashely Toyota, Inc., Gene Reed Imports, Inc., Hoover Jeep Chrysler, Inc., Hoover Motors, Inc., Hoover Chrysler-Dodge, Inc., Strom Altman Dodge, Inc., Baker Motor Company of Charleston, Inc., Miller Cadillac, Inc., Benson-Chrysler-Plymouth, Inc., Benson Ford Mercury, Inc., Big "O" Dodge of Greenville, Inc., Bradshaw Automotive Group, Inc., Spartanburg Chrysler Jeep Inc., Kia of Anderson, LLC, Toyota of Easley Inc., Farrell Automotive, Inc., Fairway Ford, Inc., Saturn of Greenville, Inc., Steve White Motors of South Carolina, Inc., D&D Motors, Inc., Burns Chrysler Dodge Jeep, LLC, John Finger Motors, Inc., Bob Richards Nissan, Dick Smith Chrysler-Jeep, Goodman Chevrolet, Inc., Henna Chevrolet-Olds-Cadillac, LLC, Honda Cars of Aiken,

Johnson Motor Company of SC, Sanders Truck Sales, Carolina Ford, Carolina International Trucks of Anderson, Clinkscales Chevrolet, Inc., Fairway Ford-Mazda, Piedmont Chrysler-Jeep, Piedmont Honda, Planet Ford, Ralph Hayes Toyota, Inc., Tom Hunter Pontiac-Buick-GMC, LLC, Upstate Automotive (Chevrolet-Cadillac), Upstate Automotive (Isuzu-Kia), Upstate Automotive (Mitsubishi), Upstate Automotive (Nissan), Gibbes Ford, Inc., Zeigler Chevrolet, Inc., B & B Ford, Inc., Whittle Motor Company, Inc., Butler Chrysler-Dodge-Jeep, Carolina Volvo, Hilton Head Automotive LLC, Hilton Head Honda, Land Rover Hilton Head, Modern Classic Motors, O. C. Welch Ford-Lincoln-Mercury, Parks Automotive Group, Parks Cadillac, Stokes Honda Cars of Beaufort, Inc., Stokes Mitsubishi, Stokes-Brown-Toyota, Dick Smith Chevrolet, Inc., Hoover Jeep-Chrysler, Inc., Hoover Motors, Inc., McElveen Pontiac-Buick-GMC, Inc., Altman Lincoln-Mercury-Hyundai, Carolina International Trucks-Charleston, Charleston Mitsubishi, Hendrick Honda of Charleston, Hoover Chrysler-Jeep, Inc., Hughes Motors, Inc., Kia Country, Lexus of Charleston, Low Country Mazda, Low Country Volkswagen, Marathon Chevrolet of N Charleston, Marchant Chevrolet Inc., McDaniels Acura of Charleston, McElveen Chevrolet, LLC, Morris Nissan, Northside Nissan, Ravenel Ford, Inc., Rick Hendrick Dodge, Rick Hendrick's Import Showplace, Saturn of Charleston, Stokes Honda North Charleston, Stokes Isuzu-Kia-Subaru, Stokes Volkswagen, Victory Hyundai of Charleston, Burns Chevrolet-Chrysler-Dodge-Jeep, Inc., Joe Gibson Suzuki, Roger Shiflett Ford, Inc., Wallace White Pontiac-Buick-GMC, Nourse Chester Automotive, Nourse Motors of Chester LLC, Bennett Motor Co., Inc., John Donoghue Ford, Inc., Lawrence

Chevrolet-Pontiac, Prothro Chevrolet-Buick-Pontiac-GMC Truck, Stokes-Craven Chrysler-Jeep-Dodge, Stokes-Craven Ford, Peters Pontiac Buick-GMC, Rizer Chevrolet Co., Inc., Walterboro Motor Sales Co., Action Ford-Mercury, Inc., John Newsome, Inc., Raceway Chrysler-Jeep-Dodge, Inc., Raceway Ford, Carolina International Trucks LLC, Marathon Chevrolet, Summerville Ford Mercury, Inc., Herlong Pontiac-Chevrolet-Buick, Inc., Jim Satcher, Inc., Yonce Ford-Mercury, Inc., Wilson Chevrolet-Oldsmobile, Inc., Wilson Chrysler-Dodge-Jeep, Inc., Auddie Brown Mitsubishi, Cale Yarborough Honda, Inc., Carolina International Trucks, Efird Chrysler-Jeep-Dodge, Inc., Florence Mack, Inc., Florence Toyota, Floyd Motor Co., Inc., Horne Ford, Inc., Kia of Florence, King Cadillac-Buick-Pontiac-GMC Truck, Inc., Lake City Ford-Mercury, LLC, Peterbilt of Florence, Raceway Chevrolet-Pontiac-Buick-GMC, Saturn of Florence, Service Motor Company, Inc., Coastal Nissan-Chevrolet-Cadillac, Hemingway Motor Co., Inc., Parrish Motor Co., Inc., Tidelands Chrysler Dodge, Ford-Lincoln-Mercury, BMS, Inc. d/b/a Breakaway Honda, Bradshaw Acura, Brockman Automotive, Carolina International Trucks-Greenville, Cherokee Kenworth, Inc., Christopher Trucks, Inc., Crown Jeep-Chrysler, Crown Nissan Greenville, Dick Smith Mitsubishi, Fairway Ford, Inc., Fairway Motorcars LLC, George Coleman Ford, Inc., Heritage Lincoln-Mercury, John Finger Mazda, Kevin Whitaker Chevrolet-Cadillac, Kevin Whitaker Chevrolet-Cadillac, Kevin Whitaker Chevrolet, Inc., Simpsonville Chevrolet, Inc., Sitton Buick-Pontiac-GMC Truck, Inc, Steve White Motors of SC, Inc., Stokes-Trainor Ford, C. Thompson Automotive, Gary Russ Chevrolet-Cadillac, Inc., George Ballentine Ford-Lincoln-Mercury, Quality Chrysler City,

Brunson Automobile Sales, Inc., Tison Motor Co., Inc., Addy's Harbor Dodge, Atlantic Chrysler-Jeep-Dodge, Atlantic Ford, Inc., Beach Ford-Lincoln-Mercury-Volvo, Inc., Bell & Bell Pontiac-GMC, Inc., Conway Chrysler-Dodge-Jeep, Inc., Conway Ford, Inc., Diamond Automotive Group, Inc., East Coast Honda, East Coast Volkswagen, Fowler Motors, Grand Strand Nissan, Inc., White Pontiac-Buick-GMC-Subaru, Hyatt Buick-GMC Trucks, Jud Kuhn Chevrolet, Kia of Myrtle Beach, Lay-Fisher Chevrolet, Inc., Myrtle Beach Chevrolet, Inc., Myrtle Beach Hyundai-Isuzu, Myrtle Beach Suzuki, Sparks Toyota, Inc., Sun Coast Mazda-Mitsubishi, Suzuki Outlet of Myrtle Beach SC, Hilton Head Chrysler Jeep Dodge, Hilton Head Hyundai, Key Infiniti LLC, Key Mazda, Key Nissan, LLC, Porsche of Hilton Head, Prestige Motorcars, LLC dba Hilton Head Jaguar, Dirk Smith Pontiac-Chrysler-Dodge-GMC-Jeep, Heritage Chevrolet-Buick, Inc., James Ervin Toyota, Redfearn Motor Co., Inc., Burns Ford-Mercury, Inc., Elrod Pontiac-Buick-GMC, Inc., H&H Chevrolet, Inc., Lancaster Dodge-Chrysler-Jeep, Lancaster Motor Co., Baldwin Pontiac-Buick-GMC, Inc., Cooper Ford, Inc., Firmin Ford, Inc., John Foster Motors, Inc., Lynn Cooper, Inc., Smith Chevrolet-Cadillac, Inc., Addy Didge, Inc., Cherokee Kenworth, Hampton Automotive, Inc., Midlands Honda, Saturn of Columbia, Inc., Stivers Chrysler-Jeep, Inc., Twin City Motor Co., Mullins Motors, Inc., Pee Dee Ford Lincoln Mercury Inc., Griffin-Flythe Chevrolet, Inc., Meggs Ford-Chrysler-Dodge-Jeep, Cromley's Inc., Jeffrey Dean Chrysler Dodge Jeep GMC, Kirby Schrader, Stokes-Trainor Chevrolet-Old Pontiac-Cadillac-Buick, Bobby Wood Chevrolet-Pontiac, Edwards Auto Sales, Inc., Lake Keowee Chrysler-Dodge LLC, Leader Ford, Performance

Chevrolet-Buick-GMC, Bob Richards Automotive, LLC, Fairey Chevrolet-Cadillac, Orangeburg Chrysler-Dodge-Nissan, Inc., Orangeburg Ford, Superior Honda, Superior Motors, Inc., Benson Ford-Mercury, Inc., Crane Chevrolet-Cadillac, Inc., Easley Mitsubishi, Easley Pontiac-Buick-GMC Truck, Inc., Hendrick Honda, Norris Ford, Inc., Tinsley Chevrolet Co. Inc., Bob Bennett Ford, Inc., Capitol Chevrolet, Capitol Hyundai, Carolina International Trucks-Cola, Columbia Freightliner, LLC, Dodgeland of Columbia, Hancock Motor Co., Hancock Volkswagen, Honda Cars of Columbia, Jim Moore Cadillac, Inc., McDaniels Acura-Porsche, Shealy's Truck Center-Cola, Stivers Lincoln-Mercury, Wray, Automotive, Inc., Cromley's Inc., Saluda Motor Sales, Inc., Dave Edwards Toyota, Dick Brooks Honda, Foothills Ford of Chesne, Joe Gibson Mitsubishi, Kia of Greer, Saturn of Spartanburg, Shealey's Truck Center, Spartanburg Dodge, Inc., Vic Bailey Ford, Inc., Vic Bailey Honda, Vic Bailey Lincoln-Mercury, Inc., Vic Bailey Volkswagen, Wakefield Buick-Pontiac-GMC, Inc., Boyle Motor Company, Boyle Toyota, Inc., Goodwin Buick-Jeep, Goodwin Honda-Mitsubishi-VW, Jones Chevrolet Co., Jones Nissan, Inc., Jones Pontiac-GMC Truck, Inc., McLaughlin Motors, Inc., Sumter Chrysler-Plymouth-Dodge, Union Chrysler-Dodge-Jeep, Inc., Big Country Chevrolet, Inc., Haselden Brothers, Inc., Longstreet Chevrolet-Buick-Cadillac-GMC, Carolina Mazda, Clinton Family Ford-Lincoln-Mercury, Dickerson Motor Co., Inc., Dunlap-Johnson Chevrolet Co. Inc., Fort Mill Ford, Inc., Fred Caldwell's Clover Chevrolet, Good Motor Company, Griffin Mitsubishi, Griffin Pontiac-Buick-GMC, Harrelson Nissan, Harrelson Toyota, Honda Cars of Rock Hill, Rick Ford, Inc., Stateline Chrysler Jeep Dodge Inc.)

402. The allegations set forth in the paragraphs above are incorporated herein as if set forth verbatim.

403. Defendants Dick Smith Motors, Inc., Pulliam Motor Co., Dick Smith Infiniti, Inc., Dick Smith Nissan of Lexington, Inc., Dick Smith Nissan, Inc., Overland, Inc. d/b/a Land Rover of Columbia, Toyota Center, LLC, Stokes Automotive, Inc., Stokes Motors, Inc., Stokes-Craven Automotive, Inc., Stokes Mazda, Inc., Palmetto Chevrolet Company, Inc., Palmetto Nissan, Inc., Palmetto Ford, Inc., Jones Ford, Inc., Harold Arnold's Sentry Buick, Inc., J. L. Investments, LP, Rick Hendrick Chevrolet, LP, Rick Hendrick Jeep Eagle, L.P., Oak Tree, Inc. d/b/a West Ashely Toyota, Inc., Gene Reed Imports, Inc., Hoover Jeep Chrysler, Inc., Hoover Motors, Inc., Hoover Chrysler-Dodge, Inc., Strom Altman Dodge, Inc., Baker Motor Company of Charleston, Inc., Miller Cadillac, Inc., Benson Chrysler-Plymouth, Inc., Benson Ford Mercury, Inc., Big "O" Dodge of Greenville, Inc., Bradshaw Automotive Group., Inc., Spartanburg Chrysler Jeep Inc., Kia of Anderson, LLC, Toyota of Easley, Inc., Farrell Automotive Inc., Fairway Ford, Inc., Saturn of Greenville, Inc., Steve White Motors of South Carolina, Inc., D&D Motors, Inc., Burns Chrysler Dodge Jeep, LLC, John Finger Motors, Inc., Bob Richards Nissan, Dick Smith Chrysler-Jeep, Goodman Chevrolet, Inc., Henna Chevrolet-Olds-Cadillac, LLC, Honda Cars of Aiken, Johnson Motor Company of SC, Sanders Truck Sales, Carolina Ford, Carolina International Trucks of Anderson, Clinkscales Chevrolet, Inc., Fairway Ford-Mazda, Piedmont Chrysler-Jeep, Piedmont Honda, Planet Ford, Ralph Hayes Toyota, Inc., Tom Hunter Pontiac-Buick-GMC, LLC, Upstate Automotive (Chevrolet-Cadillac), Upstate Automotive

(Isuzu-Kia), Upstate Automotive (Mitsubishi), Upstate Automotive (Nissan), Gibbes Ford, Inc., Zeigler Chevrolet, Inc., B & B Ford, Inc., Whittle Motor Company, Inc., Butler Chrysler-Dodge-Jeep, Carolina Volvo, Hilton Head Automotive LLC, Hilton Head Honda, Land Rover Hilton Head, Modern Classic Motors, O. C. Welch Ford-Lincoln-Mercury, Parks Automotive Group, Parks Cadillac, Stokes Honda Cars of Beaufort, Inc., Stokes Mitsubishi, Stokes-Brown Toyota, Dick Smith Chevrolet, Inc., Hoover Jeep-Chrysler, Inc, Hoover Motors, Inc., McElveen Pontiac-Buick-GMC, Inc., Altman Lincoln-Mercury-Hyundai, Carolina International Trucks-Charleston, Charleston Mitsubishi, Hendrick Honda of Charleston, Hoover Chrysler-Jeep, Inc., Hughes Motors, Inc., Kia Country, Lexus of Charleston, Low Country Mazda, Low Country Volkswagen, Marathon Chevrolet of N Charleston, Marchant Chevrolet, Inc., McDaniels Acura of Charleston, McElveen Chevrolet, LLC, Morris Nissan, Northside Nissan, Ravenel Ford, Inc., Rick Hendrick Dodge, Rick Hendrick's Import Showplace, Saturn of Charleston, Stokes Honda North Charleston, Stokes Isuzu-Kia-Subaru, Stokes Volkswagen, Victory Hyundai of Charleston, Burns Chevrolet-Chrysler-Dodge-Jeep, Inc., Joe Gibson Suzuki, Roger Shiflett Ford, Inc., Wallace White Pontiac-Buick-GMC, Nourse Chester Automotive, Nourse Motors of Chester LLC, Bennett Motor Co., Inc., John Donoghue Ford, Inc., Lawrence Chevrolet-Pontiac, Prothro Chevrolet-Buick-Pontiac-GMC Truck, Stokes-Craven Chrysler-Jeep-Dodge, Stokes-Craven Ford, Peters Pontiac Buick-GMC, Rizer Chevrolet Co., Inc., Walterboro Motor Sales Co., Action Ford Mercury, Inc. John Newsome, Inc., Raceway Chrysler-Jeep-Dodge, Inc., Raceway Ford, Carolina International Trucks LLC, Marathon

Chevrolet, Summerville Ford-Mercury, Inc., Herlong Pontiac-Chevrolet-Buick, Inc., Jim Satcher, Inc., Yonce Ford-Mercury, Inc., Wilson Chevrolet-Oldsmobile, Inc., Wilson Chrysler-Dodge-Jeep, Inc., Auddie Brown Mitsubishi, Cale Yarborough Honda, Inc., Carolina International Trucks Florence, Efird Chrysler-Jeep-Dodge, Inc., Florence Mack, Inc., Florence Toyota, Floyd Motor Co., Inc., Home Ford, Inc., Kia of Florence, King Cadillac-Buick-Pontiac-GMC Truck, Inc., Lake City Ford Mercury, LLC, Peterbilt of Florence, Raceway Chevrolet-Pontiac-Buick-GMC, Saturn of Florence, Service Motor Company Inc., Coastal Nissan-Chevrolet-Cadillac, Hemingway Motor Co., Inc., Parrish Motor Co., Inc., Tidelands Chrysler Dodge, Tidelands Ford Lincoln Mercury, BMS, Inc. d/b/a Breakaway Honda, Bradshaw Acura, Brockman Automotive, Carolina International Trucks-Greenville, Cherokee Kenworth, Inc., Christopher Trucks, Inc., Crown Jeep-Chrysler, Crown Nissan Greenville, Dick Smith Mitsubishi, Fairway Ford Inc., Fairway Motorcars LLC, George Coleman Ford, Inc., Heritage Lincoln-Mercury, John Finger Mazda, Kevin Whitaker Chevrolet-Cadillac, Kevin Whitaker Chevrolet, Inc., Simpsonville Chevrolet, Inc., Sitton Buick-Pontiac-GMC Truck, Inc., Stokes Trainor Ford, C. Thompson Automotive, Gary Russ Chevrolet Cadillac, Inc., George Ballentine Ford-Lincoln-Mercury, Quality Chrysler City, Brunson Automobile Sales, Inc., Tison Motor Co., Inc., Addy's Harbor Dodge, Atlantic Chrysler-Jeep-Dodge, Atlantic Ford, Inc., Beach Ford-Lincoln-Mercury-Volvo, Inc., Bell & Bell Pontiac-GMC, Inc., Conway Chrysler-Dodge-Jeep, Inc., Conway Ford, Inc., Diamond Automotive Group, Inc., East Coast Honda, East Coast Volkswagen, Fowler Motors, Grand Strand Nissan, Inc., Hadwin-White Pontiac-

Buick-GMC-Subaru, Hyatt Buick-GMC Trucks, Jud Kuhn Chevrolet, Kia of Myrtle Beach, Lay-Fisher Chevrolet, Inc., Myrtle Beach Chevrolet, Inc., Myrtle Beach Chrysler-Jeep, Inc., Myrtle Beach Hyundai-Isuzu, Myrtle Beach Suzuki, Sparks Toyota, Inc., Sun Coast Mazda-Mitsubishi, Suzuki Outlet of Myrtle Beach SC, Hilton Head Chrysler Jeep Dodge, Hilton Head Hyundai, Key Infiniti LLC, Key Mazda, Key Nissan, LLC, Porsche of Hilton Head, Prestige Motorcars, LLC dba Hilton Head Jaguar, Dick Smith Pontiac-Chrysler-Dodge-GMC-Jeep, Heritage Chevrolet-Buick, Inc., James Ervin Toyota, Redfearn Motor Co., Inc., Burns Ford-Mercury, Inc., Elrod Pontiac-Buick-GMC, Inc., H & H Chevrolet, Inc., Lancaster Dodge-Chrysler-Jeep, Lancaster Motor Co., Baldwin Pontiac-Buick-GMC, Inc., Cooper Ford, Inc., Firmin Ford, Inc., John Foster Motors, Inc., Lynn Cooper Inc., Smith Chevrolet-Cadillac Inc., Addy Dodge Inc., Cherokee Kenworth, Hampton Automotive Inc., Midlands Honda, Saturn of Columbia, Inc., Stivers Chrysler-Jeep, Inc., Twin City Motor Co., Inc., Mullins Motors, Inc., Pee Dee Ford Lincoln Mercury, Inc., Griffin-Flythe Chevrolet, Inc., Meggs Ford-Chrysler-Dodge-Jeep, Cromley's Inc., Jeffrey Dean Chrysler Dodge Jeep GMC, Kirby Schrader, Stokes-Trainor Chevrolet-Old-Pontiac-Cadillac-Buick, Bobby Wood Chevrolet-Pontiac, Edwards Auto Sales, Inc., Lake Keowee Chrysler-Dodge LLC, Leader Ford, Performance Chevrolet-Buick-GMC, Bob Richards Automotive, LLC, Fairey Chevrolet-Cadillac, Orangeburg Chrysler-Dodge-Nissan, Inc., Orangeburg Ford, Superior Honda, Superior Motors, Inc., Benson Ford-Mercury, Inc., Crane Chevrolet-Cadillac, Inc., Easley Mitsubishi, Easley Pontiac-Buick-GMC Truck, Inc., Hendrick Honda, Norris Ford, Inc., Tinsley Chevrolet Co., Inc.,

Bob Bennett Ford, Inc., Capitol Chevrolet, Capitol Hyundai, Carolina International Freightliner, LLC, Dodgeland of Columbia, Hancock Motor Co., Hancock Volkswagen, Honda Cars of Columbia, Jim Moore Cadillac, Inc., McDaniels Acura-Porsche, Shealy's Truck Center-Cola, Stivers Lincoln-Mercury, Wray Automotive, Inc., Cromley's Inc., Saluda Motor Sales, Inc., Dave Edwards Toyota, Dick Brooks Honda, Foothills Ford of Chesne, Joe Gibson Mitsubishi, Kia of Greer, Saturn of Spartanburg, Shealy's Truck Center, Spartanburg Dodge, Inc., Vic Bailey Ford, Inc., Vic Bailey Honda, Vic Bailey Lincoln-Mercury, Inc., Vic Bailey Volkswagen, Wakefield Buick-Pontiac-GMC, Inc., Boyle Motor Company, Boyle Toyota, Inc., Goodwin Buick-Jeep, Goodwin Honda-Mitsubishi-VW, Jones Chevrolet Co., Jones Nissan, In., Jones Pontiac-GMC Truck, Inc., McLaughlin Moors, Inc., Sumter Chrysler-Plymouth-Dodge, Union Chrysler-Dodge-Jeep, Inc., Big Country Chevrolet, Inc., Haselden Brothers, Inc., Longstreet Chevrolet-Buick-Cadillac-GMC, Carolina Mazda, Clinton Family Ford-Lincoln-Mercury, Dickerson Motor Co., Inc., Dunlap-Johnson Chevrolet Co., Inc., Fort Mill Ford, Inc., Fred Caldwell's Clover Chevrolet, Good Motor Company, Griffin Mitsubishi, Griffin Pontiac-Buick-GMC, Harrelson Nissan, Harrelson Toyota, Honda Cars of Rock Hill, Rick Ford, Inc., Stateline Chrysler Jeep Dodge Inc., and the South Carolina Automobile Dealers Association have combined together for the purposes of injuring Plaintiffs and all South Carolina car buyers whom paid administrative fees to Defendants.

404. Defendants have conspired together in a common scheme designed to deceive all car buyers by all engaging in a common practice of presenting/

advertising car prices in a misleading manner by charging "administrative fees."

405. Plaintiffs have suffered special damages as a result of Defendants conspiracy.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)

406. The allegations set forth in the paragraphs above are incorporated herein as if set forth verbatim.

407. This cause of action seeks a declaratory judgment for the purposes of determining a question of actual controversy between all parties.

408. Plaintiffs seek a determination of their rights and legal relations with the Defendants under S.C. Code Ann. §56-15-10 *et. seq*. and/or §37-2-307.

409. The issues raised by Defendants' common practice of charging administrative fees are of such wide concern and public interest that this declaratory judgment action should be decided for future guidance to insure that the public is protected.

410. Plaintiffs seek determination of the following questions:

a. Does Defendants charging of "administrative fees," and further acts as described above, violate S.C. Code Ann. §56-15-10 *et. seq*.

b. Does Defendants charging of "administrative fees" and further acts as described above, violate S.C. Code Ann. §37-2-307.

c. Are Defendants actions as described above outside the scope of S.C. Code Ann. §37-2-307.

411. Plaintiffs seek a declaratory judgment from this Court that:

a. A permanent injunction issue preventing Defendants from advertising/charging future customers with administrative fees in a manner which violates S.C. Code Ann. §56-15-10 *et. seq.*;

b. A permanent injunction issue preventing Defendants from advertising/charging future customers with administrative fees in a manner which violates S.C. Code Ann. §37-2-307;

c. Defendants be ordered to disgorge all fees collected from Plaintiffs and all car buyers whom paid administrate fees to Defendants;

WHEREFORE, Plaintiffs prays for judgment against all of the Defendants for actual and compensatory damages for two times actual damages pursuant to Plaintiffs' first cause of action, for three times actual damages for punitive damages pursuant to Plaintiffs' first cause of action, for disgorgement of all administrative fees collected by Defendants pursuant to Plaintiffs' second cause of action, for a permanent injunction pursuant to Plaintiffs' second cause of action, together with attorneys' fees, prejudgment interest and the costs of this action, and for such other and further relief as this Court may deem just and proper.

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By: /s/ Brady R. Thomas

Attorneys for the Plaintiffs

October 28, 2006

Columbia, South Carolina

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Civil Action No.: 06-CP-02-1230

HEATHER HERRON, NATALIE ARMSTRONG, ALISON DANNERT, MICHAEL RITZ, JULIE FREEMAN, CHRISTINE WATTS, MICHAEL BLEASE, MICHAEL WATTS individually and for the benefit of all car buyers whom paid "administrative fees" as described below to Defendants,

Plaintiffs,

v.

CAR MAX AUTO SUPERSTORES, INC., *et.al.*,

Defendants.

MOTION TO DISMISS AND FOR PROTECTIVE ORDER ON BEHALF OF DEFENDANT, MSA OF MYRTLE BEACH, INC. DBA ADDY'S HARBOR DODGE

TO: BRADY R. THOMAS, ESQ., ATTORNEY FOR PLAINTIFFS:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney for Defendant, MSA of Myrtle Beach, Inc. dba Addy's Harbor Dodge ("Addy's Harbor Dodge"), not waiving but specifically reserving the right to move to stay and to compel arbitration, will ten (10) days from the service of this motion, or as soon thereafter as counsel may be heard, move before the presiding judge of the Court of Common Pleas for the Second Judicial Circuit for an order pursuant to Rules 12(b)(6) and 26(c), SCRCP to dismiss and for a protective order.

Addy's Harbor Dodge will move for an order to dismiss the within action on the grounds that the Plaintiffs, none of whom allege that they purchased vehicles from Addy's Harbor Dodge, lack standing to bring this action against Addy's Harbor Dodge, and on the further grounds that the subject matter of this action, closing fees, is permitted by the South Carolina Department of Consumer Affairs under the provisions of S.C. Code Ann. §37-2-307 (2002).

Addy's Harbor Dodge will further move for a protective order that discovery not be had until the Court rules on the motion to dismiss.

This motion will be based on the pleadings filed with the Court, Plaintiffs' First Set of Interrogatories to Defendants, Plaintiffs' First Set of Request for Production to Defendants, Plaintiffs' Second Set of Requests for Production to Defendants, the South Carolina Rules of Civil Procedure, and such other and further case and statutory law as may be appropriate.

The undersigned certifies that prior consultation with opposing counsel would serve no useful purpose.

J. GREGORY STUDEMEYER
Professional Corporation
/s/ J. Gregory Studemeyer
J. Gregory Studemeyer
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Attorney for Addy's Harbor Dodge

Columbia, South Carolina
November 27, 2006

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

C.A. No.: 06 CP 02-1230

HEATHER HERRON, *et al.*,
Plaintiffs,

vs.

CARMAX AUTO SUPERSTORES, INC., *et al.*,
Defendants.

JOINT MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS

I. *Procedural History*

This action started in Aiken County with four Plaintiffs suing fifty-one motor vehicle dealerships spread throughout thirteen South Carolina counties. Only one of the four Plaintiffs alleged doing business in Aiken County. The Complaint claimed the charging of a closing fee[1] was an unfair trade practice and

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[1] The fee was authorized by the Legislature in S.C. Code Ann. § 37-2-307 (2002) and upheld in two previous circuit courts. *See* Order of the Honorable L. Henry McKellar filed October 14, 1998, in *Fanning v. Fritz's Pontiac-Cadillac-Buick et al.*, C.A. No. 90-CP-40-3555; Orders of the Honorable R. Markley Dennis filed January 11 and 15, 1999, in *Ferguson v. Charleston Lincoln Mercury, Inc.*, C.A. No. 97-CP-10-2020. The original Complaint did not reference the statute and was based on a 1994 case in Ohio. Upon information and belief, the Plaintiffs' counsel were unaware of the existence of the statute allowing the fee when the Complaint was filed. (See Exhibits A and B)

asked for declaratory relief. Two months later, an Amended Complaint was filed, adding four plaintiffs and 273 dealerships doing business in forty-one counties. The Amended Complaint also added a new cause of action for civil conspiracy. Each named plaintiff only did business with a single dealership.

Most Defendants did not file an Answer, but instead separately filed motions to dismiss for lack of standing and improper joinder, among other grounds.

At a status conference on January 12, 2007, Plaintiffs informed this Court that they have voluntarily dismissed about fifty-seven dealerships, primarily because they do not charge a closing fee. Lawsuits have been served and claims are still pending against some 267 dealerships, according to Plaintiffs. Now, these plaintiffs are attempting to keep these 267 dealerships in this case even though they never did business with 259 of them (hereinafter referred to as "no-sale Defendants").[2]

At the status conference, the Court agreed to hear the motions to dismiss the claims of all Plaintiffs against all Defendants. These motions to dismiss will be heard before discovery and further proceedings are allowed.[3] The Court also designated this case as

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[2] Plaintiffs, several of whom are employees, or relatives of employees, of Plaintiffs' counsel, no doubt recognize the standing deficiencies of the current complaint. Plaintiffs' counsel recently sent letters in January 2007 to thousands of South Carolina residents soliciting additional plaintiffs. (*See* letter attached as Exhibit A.)

[3] Defendants reserve the right to bring additional motions before the Court, as appropriate. Additionally, each Defendant with an applicable arbitration agreement reserves the right to move based on the arbitration agreement. Arbitration is a jurisdictional issue and Defendants reserve the right to raise

complex for pretrial purposes only by order filed January 30, 2007.[4]

II. *Standard for Granting a Motion to Dismiss*

A trial judge may dismiss a claim when the defendant demonstrates the plaintiffs "failure to state facts sufficient to constitute a cause of action" in the pleadings filed with the court. Rule 12(b)(6), SCRCP. A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint and the motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987). When it is determined that a plaintiff does not have standing to prosecute, the court must dismiss the action. *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994).

III. *Arguments*

A. *Plaintiffs' Complaint Must be Dismissed Because of Plaintiffs' Lack of* Standing to Sue.

1. *The Plaintiffs Lack Standing Against Those Defendants With Which They Did No Business.*

Plaintiffs' action arises from administrative or document preparation fees that each Plaintiff allegedly

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the issue of jurisdiction. Defendants respectfully request that the Court defer the motion on venue until the other motions raised in this brief have been decided. Defendants are not waiving the right to contest venue and specifically reserve the right to raise the issue at a later time.

[4] The Court requested, to the extent possible, that Defendants file one collective brief in support of their motions.

paid to a single motor vehicle dealership in connection with his or her purchase of a vehicle. Only eight Defendants allegedly did business with a named Plaintiff and none of the Plaintiffs is alleged to have done business with more than one of the Defendants. Consequently, there are approximately 259 Defendants with which Plaintiffs transacted no business. The Plaintiffs lack standing to sue any dealership with which they did not conduct business. As to all such Defendants, therefore, the complaint should be dismissed.

Standing is a "fundamental requirement for instituting an action," without which "[n]o justiciable controversy is presented." *Brock*, 443 S.E.2d at 412-13. As a result, upon determining a plaintiff has no standing to prosecute a cause of action, the court must dismiss the action. *Id.* Generally, a litigant "must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest." *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). A real party in interest is one "who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Id.* (internal citation and quotation omitted). None of these Plaintiffs has a personal stake in an action against 97% of the dealerships; each Plaintiff's only stake is with the dealership with which he or she did business.

Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained; the injury must be of a personal nature to the party bringing the action, not merely of a general

nature that is common to all members of the public. *Commander Health Care Facilities, Inc. v. South Carolina Dept. of Health and Environmental Control*, 370 S.C. 296, 634 S.E.2d 664 (Ct. App. 2006). The Plaintiffs have sustained no injury from any of the dealerships with which they did not conduct business and are not in immediate danger of a direct injury from any of these dealerships.

The South Carolina Supreme Court has also recognized a "stringent standing test." *Commander Health Care*, 634 S.E.2d at 666 (citing *Sea Pines*, 550 S.E.2d at 291). To have standing, a party must prove all elements that constitute the "irreducible constitutional minimum of standing:"

> (1) the plaintiff must have suffered an injury in fact; (2) there must be a "causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court;" and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. *Sea Pines*, 550 S.E.2d at 291 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992)).[5]

The Plaintiffs have the burden of demonstrating each of the three elements. *Sea Pines*, 550 S.E.2d at 291. Plaintiffs cannot establish standing as their claimed injury has no causal connection with the

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[5] *See also Charleston Trident Home Builders Inc. v. Town Council of Town of Summerville*, 369 S.C. 498, 632 S.E.2d 864 (2006); *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 530 S.E.2d 369 (2000).

dealerships with which they did not transact business. A plaintiff cannot sue a defendant with which it has had no dealings because South Carolina law precludes a plaintiff from suing a defendant "unless the plaintiff has suffered an injury at the hands of the defendant." *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 577 S.E.2d 190, 201 n.14 (S.C. 2003).

In *Blum v. Yaretsky*, 457 U.S. 991 (1982), the Supreme Court explained that

> [i]t is not enough that the conduct of which the plaintiff complains will injure *someone*. The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject. *Id.* at 999 (emphasis in original)

Additionally, the mere fact that each Defendant may charge a closing fee does not give Plaintiffs standing against every no-sale Defendant. In *Rock Hill Nat. Bank v. Honeycutt*, 289 S.C. 98, 344 S.E.2d 875 (Ct. App. 1986), the Court held that guarantors lacked standing to assert a claim based on harm to others because they had no personal stake in the subject matter. Likewise, the improprieties alleged by Plaintiffs cannot establish their standing with respect to the no-sale Defendants. The Amended Complaint alleges that the Plaintiffs were misled by the Defendants' salespeople and by the method in which the dealerships prepared and presented documents. The Defendants could not have misled Plaintiffs with whom they did no business. The Amended Complaint also alleges that the Plaintiffs were misled by the De-

fendants' advertising. Again, this cannot be true for those Defendants with which the Plaintiffs did no business.[6] Without any direct transaction, Plaintiffs cannot establish any harm suffered at the hands of any no-sale Defendant and, therefore, lack standing with respect to such dealerships. Thus, this Court should dismiss for lack of standing each Plaintiffs claims against all Defendants except the single Defendant with which the Plaintiff allegedly did business.

2. *The Plaintiffs Do Not Have Standing to Sue Those Defendants With Which They Did No Business Under South Carolina Code Ann § 56-15-110(2).*

a. *Well-established precedent prohibits the use of class action procedures to confer standing on plaintiffs.*

S.C. Code Ann § 56-15-110(2) also fails to establish Plaintiffs' standing as to those Defendants with which no business was conducted. According to well-established precedent, a plaintiff cannot bring a class action against persons at whose hands he suffered no injury. *Gardner*, 577 S.E.2d 190.[7]

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[6] Similarly, Plaintiffs' allegations that specific dealerships failed to file with Consumer Affairs for certain years does not provide standing to the Plaintiffs with whom those dealerships did not transact business.

[7] *See also Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997) (Individual or group must have standing to proceed in either a derivative or class action suit.); *Furman Univ. v. Livingston*, 244 S.C. 200, 136 S.E.2d 254, 256 (1964) ("Accordingly, a person who has no financial interest in taxes alleged to have been erroneously collected has no legal standing to sue for their refund"); *Wilder v. S.C. State Highway Dept.*, 228 S.C. 448,

In *Gardner*, plaintiffs brought an action for violations of the South Carolina Debt Setoff Act and, like Plaintiffs in this case, they sued defendants with which they had no connection whatsoever. The plaintiffs alleged that public agencies that collected debts by setoffs to state income tax refunds under the Debt Setoff Act had failed to comply with the Act's notice provisions. They sued defendant class members that had *not* collected debts from them (but had collected debts from other persons) using the Act. The Supreme Court held that the plaintiffs could not sue persons who did *not* collect debts from them and at whose hands they had suffered no injury.

The same is true here for Defendants with which Plaintiffs transacted no business. Just as the plaintiffs in *Gardner* suffered no injury at the hands of defendants that did not collect debts from them, so the Plaintiffs in this case suffered no injury at the hands of Defendants that did not collect administrative fees from them. Consequently, just as the plaintiffs in *Gardner* lacked standing, so do the Plaintiffs here lack standing to sue dealerships that did not sell them vehicles or charge them administrative fees.

b. *The Plain Language of the Statute Prevents Plaintiffs From Doing on Behalf of Others What They Could Not Do on Behalf of Themselves.*

A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. *Browning*

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90) S.E.2d 635, 639 (1955) (class action cannot be brought on behalf of automobile owners who have been improperly charged postage by the State Highway Department when they received their license plates in person).

v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115 (1992). A statute must be interpreted with common sense to avoid unreasonable consequences and must be construed to avoid absurd results. A sensible construction, rather than one which leads to irrational results, is always warranted. *McLeod v. Montgomery*, 244 S.C. 308, 136 S.E.2d 778 (1964). Under § 56-15-110(1):

> any person *who shall be injured in his business or property* by reason of anything forbidden in this chapter may sue therefor in the court of common pleas. (emphasis added)

This subsection gives an injured person a right to sue for his actual damages. To be liable under the Act, however, the dealer must participate in the wrongdoing. *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997); *Rowe v. Hyatt*, 321 S.C. 366, 468 S.E.2d 649 (1996). The named Plaintiffs were not injured in their person or property by dealers with which they did no business. Therefore, Plaintiffs have no claim under § 56-15-110(1) against those Defendants with which they did no business.

Subsection (2) is limited to actions brought under subsection (1), i.e., actions by persons injured against those who injured them:

> (2) When *such* action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole,[8] including actions

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[8] The statute does not relieve the putative class representative of the burden of establishing each of the prerequisites for class certification under Rule 23, SCRCP, and the Plaintiffs have not alleged any facts in support of class certification under Rule 23.

> for injunctive relief. § 56-15-110(2) (emphasis added).

Thus, actions on behalf of others are limited, as a matter of statutory construction, to those persons at whose hands the plaintiff suffered injury to "his business or property." Subsection (2) does not authorize Plaintiffs to act as private attorneys general.

c. *Rule 23 of the South Carolina Rules of Civil Procedure Pre-empts S.C. Code Ann. § 56-15-100(2)*

The language in subsection (2) is essentially the same as the former class action statute, 15-5-50 (repealed 1985), which stated:

> When the question is one of common or general interest to many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

In 1985, nine years after enacting subsection (2), South Carolina adopted the Rules of Civil Procedure. Along with establishing these Rules, South Carolina through 1985 Act No. 100 repealed Section 15-5-50 (the old class action statute, with substantially similar language as Section 56-15-110(2)). Section 3 of 1985 Act No. 100 (repealing Section 15-5-50) provided that:

> *In the event of conflict between any provision of the South Carolina Rules of Civil Procedure and any other statutory provisions as to practice and procedure not repealed by this act, the provision of the rules shall control.* However, neither the promulgation of the rules nor this act may be construed to affect the substantive legal rights of any party to any civil litigation in the courts

> of this State but shall affect only matters of practice and procedure. (emphasis added).

When a procedural statute is repealed and a new rule of civil procedure such as Rule 23 is adopted, the new rule governs all pending cases. *McGann v. Mungo*, 287 S.C. 561, 568, 340 S.E.2d 154, 156 (1986); *see also Harper v. Ethridge*, 290 S.C. 112, 348 S.E.2d 374 (1986) (new rules of civil procedure replace the repealed statute). South Carolina's adoption of the Rules of Civil Procedure and 1985 Act No. 100 § 3 preclude Plaintiffs' attempt to utilize Section 56-15-110(2) to avoid the substantive requirements of standing or the procedural requirements of the South Carolina Rules of Civil Procedure, particularly Rule 23.[9] The fact that the two statutes, Sections 56-15-110(2) and 15-5-50, were substantially the same demonstrates that Section 56-15-110(2) was intended merely to allow a representative action at a time when civil procedure rules did not contain such a provision. Section 56-15-110(2) did not (and could not) reference Rule 23, SCRCP, because it did not exist at the time. Rather, Section 56-15-110(2) simply echoed the now-repealed Section 15-5-50 allowing for class actions. Thus, the statute lost much of its importance upon adoption of the Rules of Civil Procedure. More importantly, because South Carolina established that the Rules of Civil Procedure preempt conflicting procedural rules, Plaintiffs are foreclosed from using § 56-15-110(2) to circumvent procedural requirements. Consequently, Plaintiffs cannot use the statute to establish standing.

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[9] The Amended Complaint is defective on its face in that it does not allege that the requirements of Rule 23 have been met.

Defendants' argument is further buttressed by ample case law in which courts have not allowed a plaintiff who lacks standing to assert statutory rights granted to a third person.[10] Because the Plaintiffs do not have individual standing against each of the defendants, the case should be dismissed as to all Defendants with which the Plaintiffs did not transact business. Thus, this Court should dismiss for lack of standing each Plaintiff's claims against all Defendants with which he or she did not transact business, leaving only the claims of eight Plaintiffs against eight Defendants.

3. *The Mere Assertion of a Civil Conspiracy Cause of Action Does Not Confer Standing on the Plaintiffs to Sue Defendants With Which They Did Not Transact Business.*

Although Plaintiffs allege a civil conspiracy in an attempt to join those dealerships with which they have conducted no business, this attempt at backdoor standing is precluded by our Supreme Court. More specifically, any use of the conspiracy allegation to circumvent the standing requirements would entail applying the "juridical links doctrine," which the South Carolina Supreme Court has squarely rejected. Thus, even if Plaintiffs had stated a proper claim for

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[10] *See e.g. Childress v. City of Richmond*, 134 F.3d 1205 (4th Cir. 2005) (White male police officers brought claims pursuant to Title VII, alleging that supervisor made disparaging remarks about black and female police officers and that city officials took no corrective action. The Fourth Circuit affirmed the dismissal of the white officers' action on the ground the officers did not have standing to bring an action for discrimination directed at fellow officers.)

civil conspiracy,[11] precedent bars its use as a proxy for standing.

In some jurisdictions, the "juridical links doctrine" provides a narrow exception to the requirement that a Plaintiff can maintain an action only against defendants with which he has dealt. In *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973), which first conceived the "juridical links doctrine," the question was whether "a plaintiff having a cause of action against a single defendant can institute a class action against the single defendant and an unrelated group of defendants who have engaged in conduct closely similarly to that of the single defendant on behalf of all those injured by all the defendants sought to be included in the defendant class." *Id* at 462. The court answered no, holding that the plaintiff could not maintain a claim against the defendants with which he did not have any dealings. *Id.* at 465-67. Nevertheless, the court went on to suggest, in dicta, that if the plaintiffs injuries are the result "of a conspiracy or concerted schemes between the defendants," or otherwise "juridically related in a manner that suggests a single resolution of the dispute would be expeditious," the claim could go forward. *Id.* at 466.[12] In crafting these exceptions,

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[11] Plaintiffs have not alleged facts sufficient to constitute a conspiracy claim. See section B. below.

[12] Although the court in *La Mar* framed its conclusion in terms of the class certification requirement of typicality, over time courts have expanded *La Mar's* holding – and the juridical links doctrine – for use not only in class certification analysis, but also when evaluating standing. *See Popoola v. M.D. Individual Practice Ass'n Inc.*, 230 F.R.D. 424, 431-32 (D. Md. 2005); *Henry v. Circus Circus Casinos*, 223 F.R.D. 541, 543 (D. Nev. 2004); *In re: Eaton Vance Corp. Sec. Litig.*, 220 F.R.D. 162, 170 (D. Mass. 2004).

collectively labeled the "juridical links doctrine," *see In re Eaton Vance Corp. Sec. Litig.*, 220 F.R.D. 162, 170 (D. Mass. 2004),[13] the court provided a narrow avenue for certain plaintiffs to establish standing despite not directly dealing with each defendant.

The South Carolina Supreme Court has rejected the "juridical links" doctrine. *Gardner*, 577 S.E.2d 190. The *Gardner* court found the doctrine ran counter to its previous decisions that a plaintiff may not sue a defendant unless the plaintiff has suffered an injury at the hands of the defendant. *Edisto Fleets. Inc., v. S.C. Tax Comm'n*, 256 S.C. 350, 182 S.E.2d 713 (1971) (A plaintiff cannot maintain a class action where record indicates he was not directly harmed by defendant's actions); *Furman Univ. v. Livingston*, 244 S.C. 200, 136 S.E.2d 254, 256 (1964) (only a taxpayer directly affected by erroneously paying taxes has a right to seek a refund).

Given the South Carolina Supreme Court's manifest refusal to adopt the "juridical links doctrine," Plaintiffs cannot now rely on their conspiracy – or any other potential "link" – to circumvent the standing requirements. Plaintiffs' therefore lack standing to bring any cause of action against Defendants with which they did not transact.

If a plaintiff has standing to sue any defendant simply by asserting a civil conspiracy claim no matter how temporally, geographically or physically remote from the facts and circumstances of that plaintiffs particular case, then "mass actions" like the present one will become the norm; a judicial and procedural

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[13] *See also* William D. Henderson, Comment, *Reconciling the Juridical Links Doctrine with the Federal Rules of Civil Procedure and Article III*, 67 U. CHI. L. REV. 1347 (2000).

nightmare not envisioned by any principled system of justice.

4. *The Plaintiffs Do Not Obtain Standing Through Their Declaratory Judgment Action.*

Plaintiffs' declaratory judgment cause of action also fails to establish standing as to Defendants with which Plaintiffs did not transact business. The Declaratory Judgment Act provides:

> [a]ny person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. S.C. Code Ann § 15-53-30.[14]

To state a cause of action under the Declaratory Judgment Act, a party "must demonstrate a justiciable controversy." *Id.* A justiciable controversy exists "when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." *Graham v. State Farm Mutual Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995). Additionally, in declaratory judgment actions "[t]he interest of the parties . . . to

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[14] Despite the Act's "broad language, it has limits." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004). An adjudication that "would not settle the legal rights of the parties would only be advisory in nature and, therefore, would be beyond the intended purpose and scope of [the Act.]" *Id.*

the subject matter of the controversy must be more than merely general. It must be a substantial, direct, and legally protected present interest in the relief sought." *Quinn v. City of Columbia*, 303 S.C. 405, 407-408, 401 S.E.2d 165, 167 (1991). In *Quinn*, the South Carolina Supreme Court held that subdivision residents lacked standing under the Declaratory Judgments Act to challenge the city's annexation of the subdivision because the residents did not own real property in the subdivision and, therefore, had no "legally protected present interest." *Id.* Because there was no transaction or interaction between the named Plaintiffs and the no-sale dealerships, Plaintiffs' legal interest with respect to such dealerships is neither "concrete" nor "legally protected" and any declaratory judgment would be "merely advisory in nature." Plaintiffs' declaratory judgment cause of action is, therefore, an impermissible basis to establish standing.

B. *Plaintiffs Cannot State Facts Sufficient to Constitute a Cause of Action Against the Defendants with Which They Did No Business for Violations of §56-15-10 et seq. or for Declaratory Judgment.*

For the same reasons that they lack standing, Plaintiffs cannot state facts sufficient to constitute a cause of action against those Defendants under either S.C. Code § 56-15-10 et seq. or the Declaratory Judgment Act.

First, as outlined above, the plain language of § 56-15-110 simply provides a remedy for a person who has suffered injury to his business or property against a person whose violation of the act caused that injury. The alleged injury in this case is the payment of the administrative fees. Because Plain-

tiffs have not alleged and cannot allege that this injury was caused by the Defendants that did not charge them the fees, they cannot state facts sufficient to constitute a cause of action.

Second, because the Plaintiffs cannot allege a contract, relation, or statute affecting their rights vis-à-vis Defendants with which they have no connection, they cannot state facts sufficient to constitute a cause of action under S.C. Code Ann § 15-53-30.

C. *The Plaintiffs' Civil Conspiracy Cause of Action Should be Dismissed In Its Entirety.*

Plaintiffs' allegations of a civil conspiracy should be dismissed. Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage. *Lee v. Chesterfield Gen. Hosp. Inc.*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App.1986). The difference between establishing a civil and criminal conspiracy is that for a criminal conspiracy the agreement is the gravamen of the offense, whereas for civil actions, the gravamen of the tort is the damage resulting to plaintiff from an overt act done pursuant to a common design. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 278 S.E.2d 607 (1981).

Despite being more than seventy pages long, Plaintiffs' Amended Complaint provides only a few sentences describing their substantive allegations and provides no factual allegations in support of their civil conspiracy count, which rests on the following two sentences:

> Defendants have conspired together in a common scheme designed to deceive all car buyers by all

> engaging in a common practice of presenting/ advertising car prices in a misleading manner by charging "administrative fees." Am. Comp. ¶ 404-05.

Plaintiffs' unsupported allegation that the hundreds of Defendants all conspired to charge a closing fee – a fee expressly authorized by the Legislature – does not suffice to meet any of the required elements to state a conspiracy claim.

"The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se." *Pye v. Estate of Fox*, 369 S.C. 555, 567, 633 S.E.2d 505 (2006). South Carolina courts, therefore, have long held that to allege a civil conspiracy, a plaintiff cannot rely on the same facts providing the basis for other underlying claims. Rather, a plaintiff must allege separate and distinct acts in support of, and specific additional harm caused by, the alleged conspiracy. The mere assertion of conspiracy is insufficient to grant standing to a plaintiff when the allegedly conspiratorial acts are directed at a third party and do not cause any injury to the plaintiff. The South Carolina Supreme Court has expressly affirmed the dismissal of a civil conspiracy charge as a matter of law where:

> [the] cause of action does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy. No additional acts in furtherance of the conspiracy are pled. The only alleged wrongful acts plead are those for which damages have already been sought.

Todd, 278 S.E.2d at 611. Similarly, many other courts applying South Carolina law have dismissed civil conspiracy claims on this basis.[15]

Although Plaintiffs broadly allege that they have suffered special damages as a result of the conspiracy, they have failed to allege any damages beyond those asserted in connection with the other causes of action. *See Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989) ("the damages alleged must go beyond the damages alleged in other causes of action.").[16] Special damages must be specifically alleged to avoid surprise to the defendant. *Sheek v.*

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[15] *See Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989) (affirming trial court determination that no conspiracy existed as a matter of law where plaintiff's conspiracy allegations were "simply an embellishment of his breach of contract action"); *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 611, 538 S.E.2d 15, 31 (Ct. App. 2000) ("Because Hoffman, like Todd, merely realleged the prior acts complained of in his other causes of action as a conspiracy action but failed to plead additional acts in furtherance of the conspiracy, he was not entitled to maintain his conspiracy cause of action,"); *Charleston Aluminium. LLC v. Samuel, Son & Co.*, No. 3:05-02337-MBS, 2006 WL 2370292, at *2 (D.S.C. Aug. 15, 2006) ("A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than re-allege other claims.") (internal quotation and citations omitted); *Doe v. Erskine College*, No 8:04-2300IRBH, 2006 WL 1473853, at *17 (D.S.C. May 25, 2006) ("Because Plaintiff has not asserted any additional acts in furtherance of the alleged conspiracy, the claim for civil conspiracy is dismissed.").

[16] *See also Todd*, 278 S.E.2d 607 (discharged city employee's conspiracy cause of action against city council could not be predicated on same facts as his breach of contract cause of action; conspiracy action did no more than incorporate prior allegations of breach of contract action and then allege existence of civil conspiracy.)

Lee, 289 S.C. 327, 345 S.E.2d 496 (1986).[17] It is not enough for a plaintiff to say that he has suffered special damages as such a statement does not serve the purpose of avoiding surprise. Because Plaintiffs' complaint lacks allegations to support the essential element of special damages, it fails to state facts sufficient to constitute a cause of action for conspiracy and must be dismissed. As in *Robinson v. Metts*, 86 F. Supp. 2d 557, 563 (D.S.C. 1997), "plainliff[s] allege[] special damages, but [have] failed to specify the nature of the alleged special damages arising out of the conspiracy"; therefore, the Court should dismiss the conspiracy claim.[18]

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[17] *See also* Rule 9(g), SCRCP ("When items of special damage are claimed, they shall be specifically stated.")

[18] *See also Lawson v. S.C. Dep't of Corr.*, 340 S.C. 346, 352, 532 S.E.2d 259, 261 (2000) ("Because no special damages are alleged, the trial court correctly granted Department summary judgment on the conspiracy cause of action."); *Vaught*, 300 S.C. at 209, 387 S.E.2d at 95 ("Because no special damages are alleged aside from the breach of contract damages, we hold the conspiracy action is barred under *Todd*."); *Holmes v. Donahoe*, No 2:05-2901, 2006 WL 859178, at *2 (D.S.C. Mar. 29, 2006) (holding "plaintiffs' civil conspiracy claim fails as a matter of law" because "the civil conspiracy damages are identical to the defamation and arson damages, [and] plaintiffs cannot demonstrate that the civil conspiracy damages are in addition to any damages alleged as a result of any other claims") (internal quotes omitted); *Doe*, 2006 WL 1473853, at *17 (holding that "Plaintiff's conspiracy claim also fails as a matter of law because Plaintiff has failed to plead or prove special damages" where plaintiff did not allege "damages that occurred because of the conspiracy itself, in addition to any damages alleged because of any other claims"); *Brooks v. Eagan*, No. 3:92-1276-19, 1993 WL 153921, at *4 n.4 (D.S.C. March 16, 1993) ("Because plaintiff has neither alleged in the Complaint nor offered into the record any facts support her claim of civil conspiracy other than those facts

Any injuries alleged by Plaintiffs do not stem from a conspiracy; instead they stem from the charges for closing/document fees levied by the dealers from which they purchased a car.[19] Plaintiffs' alleged damages are the fees that they were charged – nothing else. There is no separate injury from the alleged conspiracy. Absent such special damage, they cannot pursue the civil conspiracy claim.

To adequately plead a conspiracy, Plaintiffs must also assert that all Defendants – of which only eight allegedly sold a vehicle to a named Plaintiff – conspired to intentionally harm each named Plaintiff. Plaintiffs have not made such allegations, because they cannot, and their conspiracy also fails as a matter of law for this reason. *See Lee*, 344 S.E.2d at 383 ("[T]he essential consideration is not whether lawful or unlawful means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff"). Plaintiffs cannot allege that more than a single Defendant was ever aware of each Plaintiff's automobile purchase, much less that the 267 Defendants conspired to intentionally harm each of the Plaintiffs, as is necessary to state a civil conspiracy cause of action. *Future Group, II v. NationsBank*, 324 S.C. 89, 100, 478 S.E.2d 45, 50 (1996) (finding no conspiracy where "no evidence that [defendant] even knew of [plaintiff's] existence"); *Sizemore v. Georgia-Pacific Corp.*, No. 6:94-2894, 1996 WL 498410, at *13 (D.S.C.

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used to support her other causes of action, the Court will grant summary judgment in favor of defendants. . . .").

[19] *See* Am. Compl. ¶ 335; ¶¶ 338-344; 377-389 (identifying the alleged source of Plaintiffs' injury as administrative fees); ¶¶ 351-373 (identifying specific Defendants who allegedly failed to register the administrative fees with Consumer Affairs).

Mar. 8, 1996) ("[A] claim for civil conspiracy requires at least some degree of relationship between the plaintiff and the alleged conspirators."); *Waldrep Bros. Beauty Supply, Inc. v. Wynn Beauty Supply Co.*, 992 F.2d 59, 63 (4th Cir. 1993) (entering judgment as a matter of law on civil conspiracy allegation where defendants' "object was simply to make money by distributing beauty products in South Carolina; there was no evidence that [defendant] acted with malice towards [plaintiff]") (applying South Carolina law).

Therefore, the Court should dismiss the civil conspiracy cause of action as to all Defendants.

D. *The Court Should Dismiss The Actions Against All Defendants Except Taylor Investments Because Plaintiffs Have Improperly Joined Unrelated Lawsuits In One Action.*

Defendants jointly move for an order, pursuant to Rules 12(b)(6) and 20(a), SCRCP, dismissing the actions against all Defendant dealerships other than Taylor Investments on the ground of improper joinder. Plaintiffs and Defendants are improperly joined as parties in this unusual and unprecedented action.

Permissive joinder of parties is governed by Rule 20, SCRCP, which provides as follows with respect to the joinder of plaintiffs:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences *and* if any question of law or fact common to all these persons will arise in the action.

Rule 20(a), SCRCP (emphasis added).

Rule 20 similarly provides as follows with respect to the joinder of defendants:

> All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences *and* if any question of law or fact common to all defendants will arise in the action.

Id. (emphasis added).

The two criteria for determining whether either plaintiffs or defendants may be joined in the same case are similar, but they must be satisfied separately. Joinder of plaintiffs or defendants is proper only when the claim (1) arises out of the same transaction, occurrence, or series of transactions or occurrences *and* (2) a question of law or fact common to all plaintiffs or all defendants will arise in the action. Joinder is improper unless both criteria are satisfied. *Ellis v. Oliver*, 307 S.C. 365, 367, 415 S.E.2d 400, 401 (1992). "In spite of the great liberality of Rule 20(a), the rule does not excuse any of the joined parties from the obligation to state a claim against defendant or defendants upon which relief may be granted." *Karmanos v. Baker*, 617 F. Supp. 809, 814 (E.D. Mich. 1985) (denying motion of plaintiff hockey player's father to join in son's lawsuit because father could not state a claim against defendant university).

Joinder is not proper when the cases do not involve the same transaction or occurrence, do not involve a common question of law or fact, or a party simply is

not involved or liable at all in a given transaction.[20] A particularly instructive case is *Saval v. BL, Ltd.*, 710 F.2d 1027 (4th Cir. 1983). In that case, several buyers of Jaguar automobiles in a single lawsuit alleging warranty, negligence, and product liability claims sued everyone in the chain of distribution for various defects allegedly caused by badly designed cooling systems. The Fourth Circuit affirmed the district court's rejection of the plaintiffs' effort to bring a single lawsuit pursuant to Rule 20, FRCP, finding that:

> [t]he district court did not err in determining that the allegedly similar problems did not satisfy the transaction or occurrence test. The cars were purchased at different times, were driven differently, and had different service his-

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[20] *See Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 127-28, 341 S.E.2d 622, 626 (1986) (reversing judgment against bank, which had been improperly joined as defendant only in its capacity as trustee of defendant tortfeasor's funds, because there was no evidence bank had anything to do with tortious conduct of other defendants); *Valentine v. Davis*, 319 S.C. 169, 172, 460 S.E.2d 218, 220 (Ct. App. 1995) (upholding denial of joinder of additional plaintiffs because allegations asserted by plaintiffs against defendants who allegedly performed defective home repairs did not arise out of the same transaction or occurrence, and "the only connection between the claims is that the [proposed plaintiffs] are represented by the same attorney and they all assert different personal claims against the [defendants]"); *Norris v. City of Anderson*, 1999 U.S. Dist. LEXIS 21893 (D.S.C. 1999) (denying joinder under Rule 20, FRCP, in suit by seven employees for racially hostile work environment because numerous supervisors and co-workers were implicated in the claims, employees worked in different areas, alleged discrimination occurred at different times and shifts, and combining the factually dissimilar cases would certainly confuse jurors).

> tories. Quite probably, severance would have been required in order to keep straight the facts pertaining to the separate automobiles....

Saval, 710 F.2d at 1031-32.[21]

In the present case, joinder is improper because the Plaintiffs are unable to satisfy either of the two requirements for permissive joinder. There was no common transaction because each Plaintiff's individual claim did not arise out of the same transaction or occurrence. Each of the eight Plaintiffs purchased a single vehicle from a single dealership. These completely separate and unrelated sales occurred on different dates at different dealerships in different cities. Each sale involved different sales people; different sales managers; different vehicles with different accessories and different prices; different closing fees; different negotiations and discussions about price, accessories, and fees; different sales contracts; and different policies and procedures at each dealership – to name only a few of the obvious differences. While there may appear at first glance to be a common question of law because the Dealers Act provisions and closing fee statute will be discussed in all eight cases, there is no common question of law due to the different factual circumstances of each transaction. The criterion of common question is not satisfied by claims that are merely based on the same legal

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[21] *See Turpeau v. Fidelity Financial Services Inc.*, 936 F.Supp. 975 (N.D. Ga. 1996) (Seven plaintiffs, as representatives of a putative class, sued eleven defendants for selling excess credit life insurance in violation of a Georgia statute. The court ruled that "each credit transaction at issue was made by different Plaintiffs with different Defendants. The court, therefore, is persuaded that the transactions are not sufficiently related so as to permit joinder under Rule 20(a).").

theory. *Wynn v. National Broadcasting Co., Inc.*, 234 F.Supp.2d 1067, 1081 (C.D. Cal. 2002); *Grayson v. K Mart Corp.*, 849 F. Supp. 785, 789 (N.D. Ga. 1994).

Therefore, the Court should reject Plaintiffs' attempt to join all Defendants in the same lawsuit.

IV. *Conclusion*

Eight Plaintiffs are attempting to bring an action against 267 dealers, 97% of which they have done no business. Furthermore, Plaintiffs are seeking to bootstrap themselves into standing through § 56-15-110(2) and allegations of civil conspiracy. Plaintiffs cannot bring an action on behalf of third parties when they themselves lack standing, and it is fundamentally unfair to force the Defendants to defend against claims from persons with whom they have never dealt. Furthermore, it would be a quantum leap to find a person guilty of violation of the South Carolina Dealers Act when the fees charged were actually authorized and approved by a valid state statute.

Defendants respectfully request that this Court grant their motions to dismiss as set forth above.

Respectfully submitted this 12th day of February, 2007,

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February 12, 2007
Columbia, South Carolina

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Civil Action No.: 06-CP-02-1230

HEATHER HERRON, ET AL.,
Plaintiffs,

v.

CARMAX AUTO SUPERSTORES, *et.al.*,
Defendants.

NOTICE OF MOTION AND MOTION TO AMEND COMPLAINT

TO: ALL DEFENDANTS:

You will please take notice that the Plaintiffs, by and through counsel, will move before the Presiding Judge for the Court of Common Pleas for Aiken County, at the Aiken County Courthouse, Aiken, South Carolina, on the tenth day after service hereof or as soon thereafter as counsel may be heard, for an Order allowing the Plaintiffs to amend their Complaint. This motion is made pursuant to Rule 15, SCRCP, in order to: (1) add Plaintiffs, all of whom were charged administrative fees and harmed by Defendants' common practice; and (2) add allegations concerning Defendants charging administrative fees for profit. Attached as Exhibit A is a copy of the proposed Second Amended Complaint.

Justice requires that Plaintiffs be allowed to file this amendment and no parties will suffer undue prejudice by this amendment. Each Defendant with the Amendment has a corresponding Plaintiff that

purchased motor vehicle from such Defendant or a Defendant with common control under S.C. Code Ann. §56-15-10(n).

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By: /s/ [Illegible]

Attorneys for the Plaintiffs
June __, 2007

Pursuant to Rule 11(a), SCRCP, the undersigned counsel certifies that consultation would serve no useful purpose.

/s/ Brady R. Thomas
Brady R. Thomas

IN THE COURT OF COMMON PLEAS
IN THE STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Civil Action No.: 06-CP-02-1230

HOWARD ADAMS; ALAMEDA-WEST BERYL; DENISE ALEXANDER; J.C. ALEXANDER; MELISSA ALLMAN; NATALIE ARMSTRONG; RICHARD ANDERSON; JOANN ASH; ROBERT BACON; HAROLD BAILEY; MARIA BAILEY; SHELLEY BARKER; TERESA BECK; ELMER BELL; RALPH BELLAND; BOYD DARREN BENNET; JAMES BERGEN; TABITHA M. BESSERT; TERRY BEYLOTTE; DAVID BISHOP; J.B. BISHOP; JOHN BISSET; MINNIE BLACKWELL; DELORES BLAND; MICHAEL BLEASE; KIMBERLY BOLT; LARRY BOYER; ROBERT BRIDGEMAN; CHARLES BROWN; JERRY BROWN; JOHN L. BROWN; ZEBEDEE BROWN; DAVEY BRUNHAM; KIM BRYANT; CYNTHIA BUFFINGTON; WILLIAM BUFFINGTON; STEVEN BURELL; SANDY BURROWS; DONNA CALLAHAN; ROBERT CALLAHAN; JOHN A. CARLOS SR.; RALPH AND DORENE CHAPMAN; MONROE CHASTAIN; ROBERT CHEREPINSKY; WILLIAM CHILDERS; DURAND G. COATS; MABLE COLBERT; AUDREY CONRAD; ALBERT COOK; JENNY COULTER; MELBA COWARD; LEANN COX; PATRICIA CRAWFORD; MARK AND KIM CROWNOVER; FELDON CURTIS; JOSEPH DAY; ALISON DANNERT; ROBERT DAWKINS; BOYCE DAVIS; JEROME B. DAVIS; TIMOTHY EARL DAVIS; RUSSELL DELLINGER; MELANIE DIETTERICK; VICKIE DILLING; DAVID DOBBS; LAURA DOBY; MARY V. DOOLEY; A. RAND DOOLITTLE; JESSICA ELLIOT; MICHAEL TODD ELLISON; DONNA ELM; DAVID ESCOBAR; TRACY EVE; MACK FAILE; JOHN ALLEN FELLOWS; PAULA FELLOWS; BOBBY FERRELL; FREDERICK FINN; FAWN FOULKS; DON FOWLER;

Dr. Carl Freedman; Julie Freeman; James French; Kevin Frick; Melvin Gadson; Derrick Gardner; Lucinda Hair Gary; Donna Glick; Miguel Gonzalez; Lorraine Gould; Susan Gravely; Jolene Clardy Gray; George Grieve; Doris Grimbruch; Judith Grip; Jackquline Grove; John Hall; Angela Harrison; Louis H. Hart; Michael Haskett; Carolyn Hatcher; Neil Helm; Billy Lee Hensley; Mitchell Henson; Heather Herron; Shalamar Heyward; Shonya Heyward; Jasper Hickman; Carol Hood; Beth Horbin; Wade Howe; J.W. Hunt; Doris Jackson; George Jackson; Helen Jackson; Deloris Jacobs; Perry James; Charles Ray Johnson; Donnie Johnson; Ethal Johnson; Kenneth Johnson; Beverly Jones; Marjorie Jones; Charles Julian; Robert Kelley; William Kidd; Shane Kimmel; Norris King; Norman Kinloch; Dennis Kirby; Barb Kittinger; Fran Koelman; Richard M. Lanford; Cynthia Legare; Kenneth Leonard; Mary Lett; McArthur Lewis; Steven Linden; Robert Lockman; Jimmie Logan; Jamie Lowman; Joseph R. Mackey; G. Marianos; Thomas Mathias; Linda McCullough; Tommy McFadden; Henry McKnight; Raymond McLaughlin; Arthur McWhorter; Kay Merchant; Gail Meyers; Brian Miller; Frank Miller; James Miller; Robert Miller; Roger Miller; Sandra Miller; April Moore; Carolyn Moultrie; Joe Muller; John Myer; Robert Nash; Larry Naybor; Gary Neal; Sherry Nix; James Norris; Jatana Norris; Robert Orchard; Olianus Orsing; Janice Owens; Kim Paszko; Daniel Patrick; Thomas Pigott; Judith Post; Donnie Pridgen; Sherry Puckett; Mario Rangel; Susan Ranke; Christine Rayburn; Chad and Kandi Rector; Gina Reilly; Betty Reynolds; Richard Ricciardi;

MERILYN RICH; MICHAEL RITZ; CHRISTOPHER ROBBINS; DENISE ROBERTSON; FRED ROCQUEMORE; CHARISSA ROSS; WILLIAM ROSS; SHAWN ROWE; DAVID RUTLEDGE; MITCHELL SACKSON; MARLENE SANDERS; MARTHA SANDERS; DAVID SCHEUERL; CATHERINE SCOTT; MALCOM SCOTT; OTIS SEGARS; DENNIS SENN; ROBERT SETZER; ROBERT SHAFFER; ELLIOT SHARPE; BILLY SHAW; ARTHUR SHIELDS; C.M. SHOKES; LYA SIMONE; KENNETH T. SKEWS; PAUL SMINKEY; DAVID C. SMITH; ERNEST L. SMITH; SAMUEL SMITH; SUSAN SMITH; JAMES STEVENS; WAYNE STONE; JAMES SUMMERS; SUNBELT ROOFING SERVICE; CHARLES J. SWART; JEAN JOHNSON TAYLOR; LORETTA TAYLOR; TEDDY TERRY; MARK THAYER; STAN THIGPEN; JAMES ROBERT THOMAS; JEWEL TINDALL; DONNA TRAPP; MIKEL TRAPP; RHONDA TROTTER; DAVID TRUITT; RAY TRULUCK; HARVESTER TYLER; COLLEN VAN BURNS; CANDY WALLACE; GUS WARD; DAVID WARNER; MICHELLE WATKINS; CHRISTINE WATTS; MICHAEL WATTS; DOLLY WEBSTER; DONALD WELCH; LARRY WELCH; MELODY WELCH; FRED WHITE; THOMAS WIGGS; FRANCES WILBANKS; ANGLO WILLIAMS; CHRISTOPHER WILLIAMS; SHARMAN WILLIAMS; ROY GENE WILSON; KENNETH W. WILT; JAMES WINBORNE; PAUL WINNINGHAM; CARL WOODY; SAMUEL YOZZO; PAUL ZAK

Plaintiffs,

VS.

ACTION FORD MERCURY, INC.; ADDY'S HARBOR DODGE A/K/A MSA OF MYRTLE BEACH; ALTMAN LINCOLN MERCURY HYUNDAI A/K/A SONIC NORTH CHARLESTON, INC.; ATLANTIC CHRYSLER JEEP DODGE; ATLANTIC FORD, INC.; B&B FORD, INC.; BAKER MOTOR COMPANY OF CHARLESTON; BEACH FORD LINCOLN MERCURY VOLVO, INC.; BENSON CADILLAC NISSAN, INC.; BENSON CHRYSLER-PLYMOUTH INC.; BENSON FORD MERCURY,

INC.; BIG "O" DODGE OF GREENVILLE, INC.; BIG COUNTRY CHEVROLET, INC.; BMS, INC D/B/A BREAKAWAY HONDA; BOB RICHARDS AUTOMOTIVE, LLC; BOB RICHARDS NISSAN; BOBBY WOOD CHEVROLET PONTIAC; BOYLE MOTOR COMPANY, INC.; BOYLE TOYOTA, INC.; BRADSHAW ACURA; BRADSHAW AUTOMOTIVE GROUP, INC.; BRUNSON AUTOMOTIVE SALES INC.; BURNS FORD MERCURY, INC.; BUTLER CHRYSLER DODGE JEEP; C. THOMPSON AUTOMOTIVE; CALE YARBOROUGH HONDA, INC. A/K/A CALE YARBOROUGH MOTORS OF SC; CAPITOL CHEVROLET A/K/A SONIC NEWSOME CHEVROLET WORLD; CAPITOL HYUNDAI A/K/A SONIC CAPITOL IMPORTS, INC.; CARMAX AUTO SUPERSTORES; CAROLINA MAZDA; CAROLINA VOLVO A/K/A SAVANNAH INTERNATIONAL MOTORS, INC.; CENTURY BMW A/K/A SONIC AUTOMOTIVE; CHARLESTON MITSUBISHI; CLINTON FAMILY FORD LINCOLN MERCURY; COASTAL NISSAN CHEVROLET CADILLAC; CONWAY CHRYSLER DODGE JEEP, INC.; CONWAY FORD, INC.; COOPER FORD, INC.; CRANE CHEVROLET CADILLAC, INC.; CROWN-JEEP CHRYSLER; CROWN NISSAN GREENVILLE; D&D MOTORS, INC.; DIAMOND AUTOMOTIVE GROUP, INC. DICK DYER & ASSOCIATES. INC.; DICK DYER TOYOTA; DICK SMITH CHEVROLET, INC.; DICK SMITH CHRYSLER, INC.; DICK SMITH INFINITI, INC.; DICK SMITH MITSUBISHI; DICK SMITH MOTORS, INC.; DICK SMITH NISSAN, INC.; DICK SMITH NISSAN OF LEXINGTON; DICK SMITH PONTIAC CHRYSLER DODGE GMC JEEP; DUNLAP JOHNSON CHEVROLET CO., INC; EASLEY MITSUBISHI A/K/A PROGRESSIVE INVESTMENT CONCEPTS, INC.; EAST COAST HONDA A/K/A APEX AUTOMOTIVE, LLC; EAST COAST VOLKSWAGEN A/K/A EAST COAST AUTOMOTIVE, LLC; ELROD PONTIAC BUICK GMC, INC.; FAIRWAY FORD, INC.; FAIRWAY FORD-MAZDA A/K/A FAIRWAY MANAGEMENT OF

ANDERSON, LLC; FAIRWAY MOTORCARS, LLC; FARRELL AUTOMOTIVE, INC.; FLORENCE TOYOTA A/K/A CLONINGER, LLC FLOYD MOTOR COMPANY, INC.; FOOTHILLS FORD OF CHESNEE, INC.; FORT MILL FORD, INC.; FRED CALDWELL'S CLOVER CHEVROLET; GALEANA CHRYSLER PLYMOUTH, INC. A/K/A GALEANA CHRYSLER JEEP INC.; GENE REED TOYOTA, INC. A/K/A GENE REED IMPORTS; GEORGE BALLENTINE FORD LINCOLN MERCURY, INC.; GOOD MOTOR COMPANY; GOODWIN BUICK JEEP; GOODWIN HONDA MITSUBISHI-VW; GRAND STRAND NISSAN, INC.; GRIFFIN MITSUBISHI A/K/A GRIFFIN IMPORTS, LLC; GRIFFIN PONTIAC BUICK GMC TRUCK, INC.; HADWIN WHITE PONTIAC BUICK GMC SUBARU; HAMPTON AUTOMOTIVE, INC.; HANCOCK BMW-VOLKSWAGEN; HANCOCK BUICK COMPANY OF COLUMBIA; HANCOCK MOTOR COMPANY; HAROLD ARNOLD'S SENTRY BUICK, INC. A/K/A HAROLD ARNOLD'S SENTRY BUICK PONTIAC GMC; HARRELSON NISSAN; HARRELSON TOYOTA; HENDRICK HONDA OF CHARLESTON A/K/A RICK HENDRICK HONDA CARS HERITAGE LINCOLN MERCURY; HILTON HEAD AUTOMOTIVE, LLC; HILTON HEAD CHRYSLER JEEP DODGE; HONDA CARS OF AIKEN; HONDA CARS OF COLUMBIA; HONDA CARS OF ROCK HILL; HOOVER CHRYSLER DODGE A/K/A HOOVER DODGE, INC.; HOOVER DODGE, INC.; HOOVER JEEP CHRYSLER, INC.; HOOVER MOTORS, INC.; HORNE FORD, INC.; HYATT BUICK GMC TRUCKS; J.L.H. INVESTMENTS, LP A/K/A HENDRICKS HONDA; JAMES ERVIN TOYOTA; JEFFREY DEAN CHRYSLER DODGE JEEP GMC; JIM MOORE CADILLAC, INC.; JOE GIBSON MITSUBISHI A/K/A JOE GIBSON AUTOMOTIVE; JOE GIBSON SUZUKI D/B/A JOE GIBSON AUTO WORLD; JOHN FINGER MAZDA; JOHN FINGER MOTORS, INC.; JOHN NEWSOME, INC.; JOHNNY'S BUICK PONTIAC; JONES CHEVROLET CO., INC; JONES NISSAN, INC.; JONES PONTIAC GMC TRUCK, INC.; JUD KUHN

CHEVROLET; KEVIN WHITAKER CHEVROLET, INC. A/K/A KEVIN WHITAKER CHEVROLET-CADILLAC, INC.; KEY INFINITI, LLC; KEY MAZDA; KEY NISSAN, LLC; KIA COUNTRY A/K/A SC AUTOMOTIVE INVESTMENTS, LLC; KIA OF ANDERSON, LLC; KIA OF FLORENCE; KIA OF GREER; KIA OF MYRTLE BEACH; LAKE CITY FORD MERCURY, LLC; LAKE KEOWEE CHRYSLER DODGE, LLC; LAY-FISHER CHEVROLET, INC; LEXUS OF CHARLESTON; LOW COUNTRY MAZDA; LOW COUNTRY VOLKSWAGEN; LYNN COOPER, INC.; MARATHON CHEVROLET; MARATHON CHEVROLET OF NORTH CHARLESTON A/K/A CHARLESTON AUTO PARTNERS; MCDANIEL'S ACURA OF CHARLESTON; MCDANIEL'S ACURA PORSCHE MCELVEEN CHEVROLET, LLC; MCELVEEN PONTIAC BUICK GMC, INC.; MIDLANDS HONDA; MODERN CLASSIC MOTORS; MORRIS NISSAN A/K/A MORRIS MOTORS, INC.; MULLINS MOTORS, INC.; MYRTLE BEACH CHEVROLET, INC.; MYRTLE BEACH CHRYSLER JEEP, INC.; MYRTLE BEACH HYUNDAI-ISUZU; MYRTLE BEACH MITSUBISHI; NORRIS FORD, INC.; NORTHSIDE NISSAN; O.C. WELCH FORD LINCOLN MERCURY; ORANGEBURG FORD; OVERLAND, INC. D/B/A LAND ROVER OF COLUMBIA; PALMETTO FORD, INC.; PALMETTO NISSAN, INC.; PARKS AUTOMOTIVE GROUP; PARKS CADILLAC, INC.; PERFORMANCE CHEVROLET BUICK GMC A/K/A PERFORMANCE MOTORS; PIEDMONT CHRYSLER JEEP A/K/A PIEDMONT AUTOMOTIVE OF ANDERSON; PIEDMONT HONDA A/K/A PIEDMONT AUTOMOTIVE OF ANDERSON; PRESTIGE MOTORCARS, LLC D/B/A HILTON HEAD JAGUAR; PULLIAM MOTOR COMPANY; QUALITY CHRYSLER CITY; RACEWAY CHEVROLET PONTIAC BUICK GMC; RACEWAY CHRYSLER JEEP DODGE, INC; RACEWAY FORD; RALPH HAYES TOYOTA, INC.; REDFEARN MOTOR COMPANY; RICK HENDRICK CHEVROLET, LP; RICK HENDRICK DODGE; RICK HENDRICK HONDA CARS COMPANY;

RICK HENDRICK JEEP EAGLE, L.P.; RICK HENDRICK'S IMPORT SHOWPLACE; SATURN OF CHARLESTON; SATURN OF GREENVILLE, INC.; SATURN OF SPARTANBURG; SIMPSONVILLE CHEVROLET, INC.; SITTON BUICK PONTIAC GMC TRUCK; SPARKS TOYOTA, INC. A/K/A RICK SPARKS ENTERPRISES, INC.; STATELINE CHRYSLER JEEP DODGE, INC.; STEVE WHITE MOTORS OF SOUTH CAROLINA; STIVERS CHRYSLER JEEP, INC. A/K/A STIVERS AUTOMOTIVE OF LEXINGTON; STIVERS LINCOLN MERCURY A/K/A STIVERS AUTOMOTIVE OF COLUMBIA; STOKES AUTOMOTIVE INC.; STOKES BROWN TOYOTA; STOKES CRAVEN AUTOMOTIVE, INC.; STOKES CRAVEN CHRYSLER JEEP DODGE; STOKES CRAVEN FORD; STOKES HONDA NORTH CHARLESTON; STOKES ISUZU KIA SUBARU; STOKES MAZDA, INC.; STOKES MITSUBISHI; STOKES TRAINOR CHEVROLET OLD PONTIAC CADILLAC BUICK; STOKES TRAINOR FORD; STOKES VOLKSWAGEN; STROM ALTMAN DODGE, INC.; SUMMERVILLE FORD MERCURY, INC.; SUMTER CHRYSLER PLYMOUTH DODGE; SUPERIOR HONDA A/K/A J.M.G. INC; SUPERIOR MOTORS, INC.; TAYLOR TOYOTA A/K/A TAYLOR INVESTMENTS; TIDELANDS CHRYSLER DODGE A/K/A TIDELAND 4, LLC; TIDELANDS FORD LINCOLN MERCURY; TOM HUNTER PONTIAC BUICK GMC, LLC; TOYOTA CENTER, LLC; TOYOTA OF EASLEY, INC.; TOYOTA OF GREENVILLE, INC.; TOYOTA OF GREER; UNION CHRYSLER DODGE JEEP, INC; UPSTATE AUTOMOTIVE CHEVROLET CADILLAC A/K/A UPSTATE AUTOMOTIVE GROUP UPSTATE AUTOMOTIVE ISUZU KIA; UPSTATE AUTOMOTIVE MITSUBISHI; UPSTATE AUTOMOTIVE NISSAN; WEST ASHLEY TOYOTA A/K/A OAK TREE, INC.; WRAY AUTOMOTIVE, INC; AND AGAINST ALL MOTOR VEHICLE DEALERS OWNED OR CONTROLLED BY DEFENDANTS AS DEFINED AS THE SC CODE ANN. § 56-15-10 (H).

Defendants.

SECOND AMENDED COMPLAINT

Plaintiffs above-named all individually and pursuant to S.C. Code Ann § 56-5-110 for the benefit of all others who paid "administrative fees"

* * * *

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Case No. 2006-CP-02-1230

HEATHER HERRON, *et al.*,
Plaintiffs,

v.

CAR MAX AUTO SUPERSTORES, *et.al.*,
Defendants.

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND THE AMENDED COMPLAINT

NOW COMES the undersigned, attorneys for the Defendants and submit this Response in opposition to Plaintiffs' Motion to Amend the Complaint as follows:

FACTS AND PROCEDURAL HISTORY

The original complaint was brought by four (4) Plaintiffs against fifty-one (51) defendants on August 29, 2006 alleging that a closing fee was an unfair trade practice and asking for declaratory relief. Plaintiffs then filed a Corrigenda dated September 1, 2006. On October 28, 2006, the Complaint was amended adding four (4) Plaintiffs and 273 Defendants for a total of 8 Plaintiffs and 324 Defendants. Currently, there are 8 Plaintiffs and 267 Defendants of which 259 Defendants have never transacted business with the named Plaintiffs.

On June 2, 2007, Plaintiffs' counsel served their Notice to Amend and Motion to Amend the Complaint pursuant to Rule 15 along with a copy of the proposed Second Amended Complaint. The Second Amended Complaint lists a total of 258 Plaintiffs and 267 Defendants.

Upon information and belief, many of the Plaintiffs now named in the complaint are the result of the Plaintiffs' attorneys sending out "ADVERTISING MATERIAL" to people whose information they obtained from FOIA requests to the South Carolina Department of Motor Vehicles. (See attached Exhibit #1) Each of the 258 Plaintiffs listed in the Second Amended Complaint allege to have purchased a car from one of the 267 Defendants named. These represent 258 separate transactions and/or occurrences throughout the state and each with separate and distinct facts and witnesses.

Defendants oppose the Plaintiffs' Motion to Amend the Complaint based upon South Carolina statutes, court rules and case law.

LAW AND ARGUMENT

A. Rule 15 Does Not Allow for the Addition of New Parties

The Plaintiffs' have moved to amend the Complaint pursuant to SCRCP Rule 15.[1] Rule 15 in part states:

> A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive

[1] Plaintiffs' Motion is contrary to their position that they can bring this action "on behalf of all persons who paid an administrative fee." (Plaintiffs' Memorandum, page 5)

> pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.

This rule allows only an existing plaintiff to add, modify, delete, or change claims against an existing defendant. Nowhere in the rule does it allow for new parties to be added as Plaintiffs. Courts of this state have not allowed parties to be added to an existing lawsuit using Rule 15. The Court of Appeals in *Valentine v. Davis*, 319 S.C. 169 at 172, 460 S.E.2d 218 (S.C. App. 1995) held:

> Rule 15, SCRCP, does not allow an existing plaintiff to add a new plaintiff to the case to assert a claim against the defendant. Rule 15(a) only permits an existing plaintiff to add, modify, delete, or change claims against an existing defendant.

Leave to amend under Rule 15 cannot be allowed where there is prejudice to a party. *Twelfth RMA Partners, L.P. v. National Safe Corp.*, 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999). The proposed amendment would unfairly prejudice any dealership with an applicable arbitration agreement. There is no risk to the proposed Plaintiffs separate claims being prejudiced or their rights impeded. The proposed additional Plaintiffs in this case have no real rights or interests in the outcome of the original parties' case. Each Plaintiffs' claims are separate and distinct claims against separate and distinct Defendants arising out of separate and distinct transactions

and/or occurrences. No Plaintiff has a real interest in the sale of an automobile to another Plaintiff in that the outcome of one has no bearing or relation to the outcome of the other.

B. The Practical Implications of Plaintiffs' Motion

The Court in its discretion must "consider the practical implications of a decision denying or allowing intervention." *Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). The practical application of the Court allowing the Plaintiffs to add 250 new parties to this action is the insurmountable task of coordinating and producing discovery, undue delay, undue burden and prejudice to each defendant by requiring them to expend time, money and resources defending a lawsuit in which only one or two named Plaintiffs have ever had any contact with them.

> Although the rules of joinder and intervention are to be liberally construed, permitting [a party] to join in a . . . court action in which it has no real interest stretches beyond liberal construction and creates a situation in which any party with a remotely tangential interest will be allowed to interject themselves into pending litigation. We do not interpret the rules to allow such manipulation.

Id. at 137.[2]

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[2] Plaintiffs' motion does not fall within Rules 19, 20, 21, or 24's provisions for allowing persons to be joined to a lawsuit. Each Plaintiff has separate claims against separate defendants that are common only in that their claims are based upon the same statute. "Individuals did not meet the criteria of Rule 20(a), SCRCP where the proposed amended complaint merely showed the allegations asserted by the individuals and the

C. Personal Information Obtained from a State Agency Cannot be Used to Solicit Potential Plaintiffs

Lastly, the Defendants ask this Court to deny the Plaintiffs' motion to amend because a substantial number of the proposed additional Plaintiffs were obtained by Plaintiffs' counsel using a Freedom of Information Act request to the South Carolina Department of Motor Vehicles. On several different occasions counsel for the Plaintiffs sent out mass "ADVERTISING MATERIAL" in the form of a letter to recent car purchasers listed in the SCDMV's FOIA response. (Exhibit 1)

The *South Carolina Family Privacy Act* (SC ST § 30-2-50) provides that: "A person or private entity shall not knowingly obtain or use any personal information obtained from a state agency for commercial solicitation directed to any person in this State." This same statute defines commercial solicitation as "contact by telephone, mail, or electronic mail for the purpose of selling or marketing a consumer product or service." *Id.* at § 30-4-20.

The "advertising material" distributed by Plaintiffs' counsel offers its recipient the service of the attorneys by way of consultation to discuss that person's rights and options. The very purpose of this letter is to invite its recipient to join in a lawsuit wherein the attorneys will offer the Plaintiffs their services in exchange for a percentage of any award or

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existing plaintiffs, and the only connection between the claims of the individuals and the current plaintiffs was that they were represented by the same attorney, but they all asserted different personal claims against the defendant." *Valentine v. Davis*, 319 S.C. 169, 460 S.E.2d 218 (S.C.App. 1995).

settlement. This solicitation, in effect, is no different than any other commercial solicitation of consumer services and is prohibited by the statute.

The Federal Driver's Privacy Protection Act, *18 U.S.C.A. § 2721*, also applies and states in part:

> (a) In general.—A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:
>
> (1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section;

Plaintiffs may claim that they fall under exception (b)(4) pertaining to information "[f]or use in connection with any civil . . . proceeding in any Federal, State, or local court or agency . . . ." However, solicitation of clients is not use in connection with a civil proceeding. In an analogous case, the Court of Appeals for the District of Columbia addressed the use of records under the Freedom of Information Act concerning the identity and addresses of motorists who received traffic violation citations as a result of being photographed by a "red light camera" at a particular intersection. The D.C. Court of Appeals found that the attorney who requested the information could not gain access to such information by relying on a provision of the Motor Vehicle Safety Responsibility Act which authorized disclosure of driver operating records where he wanted to solicit motorists to bring a class action lawsuit. *Wemhoff v. District of Columbia*, 887 A.2d 1004 (Ct. App. DC 2005). The D.C. Court of Appeals specifically found

that solicitation of motorists and use of driver operating records for matters unrelated to accidents fell outside the intent of Congress in enacting the MVSRA.

The *Wemhoff* Court also addressed whether the information could be disclosed under the "investigation in anticipation of litigation" exception in *18 U.S.C.A. § 2721*. The Court found that the wording of the federal statute itself suggests ". . . Congress did not intend that personal information in motor vehicle records would be used to contact persons to become plaintiffs in a lawsuit . . . ." In particular the Court noted that subsection (5), which immediately follows the litigation exception, contains a condition that the protected information may only be released "so long as [it] is not published, redisclosed, or used to contact individuals."

The District Court for the Eastern District of Pennsylvania found "the [litigation] exception applies only if a defendant obtains protected information for permitted 'use, . . . [and that] use' implies a reasonable likelihood that the decision maker would find the information useful in the course of the proceeding." *Pichler v. UNITE, et al.*, 339 F.Supp.2d 665 (E.D.Pa. 2004). The *Wemhoff* Court interpreted the permitted use to be the type of "background work or search for material which would determine substantively, whether one has a viable theory of litigation . . ." *Wemhoff, supra.*

It would be contrary to the intent of both statutes for the Plaintiffs to use this information to solicit additional Plaintiffs. Because the Second Amended Complaint proposes to add 250 new Plaintiffs that were obtained from the SC DMV records and the use for which this information is sought is outside the

scope of the statutes the Plaintiffs' motion to amend should be denied.

CONCLUSION

Plaintiffs have moved pursuant to SCRCP Rule 15 to amend their complaint by adding 250 new Plaintiffs; Rule 15 does not allow the adding of parties and therefore the Plaintiffs' motion must be denied.

Additionally, the Defendants urge the Court to dismiss Plaintiffs' motion to amend as the proposed additional Plaintiffs are the result of improper use of the Freedom of Information Act requests and do not serve to meet the ends of justice.

Respectfully submitted,

/s/ [Illegible]
Bradford N. Martin, Esquire (SC Bar No. 3658)
Laura W. H. Teer, Esquire (SC Bar No. 16698)
Keely M. McCoy, Esquire (SC Bar No. 72575)
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July 25, 2007

ATTORNEYS FOR ATLANTIC CHRYSLER-JEEP-DODGE; B & B FORD, INC.; BEACH FORD-LINCOLN-MERCURY-VOLVO, INC.; B&B FORD; BENSON CADILLAC-NISSAN, INC.; BENSON CHRYSLER-PLYMOUTH, INC.; BENSON FORD MERCURY, INC.; BENSON FORD-MERCURY, INC.; BIG COUNTRY CHEVROLET, INC.; BMS, INC. D/B/A BREAKAWAY HONDA; BOB RICHARDS AUTOMOTIVE, LLC; BOB RICHARDS NISSAN BRADSHAW ACURA;

BRADSHAW AUTOMOTIVE GROUP, INC.; BURNS FORD-MERCURY, INC.; BUTLER CHRYSLER DODGE; CHARLESTON MITSUBISHI; COASTAL NISSAN-CHEVROLET-CADILLAC; CONWAY CHRYSLER-DODGE-JEEP, INC.; CONWAY FORD, INC.; CROWN JEEP-CHRYSLER; CROWN NISSAN GREENVILLE; D&D MOTORS, INC.; DICK BROOKS HONDA; FARRELL AUTOMOTIVE, INC.; FRED CALDWELL'S CLOVER CHEVROLET; GRAND STRAND NISSAN, INC.; HARRELSON NISSAN; HARRELSON TOYOTA; HILTON HEAD CHRYSLER JEEP DODGE; HILTON HEAD HYUNDAI; HOOVER CHRYSLER-JEEP, INC.; HOOVER DODGE, INC.; HOOVER JEEP CHRYSLER, INC.; HOOVER MOTORS, INC.; HYATT BUICK-GMC TRUCKS; JOHN DONOGHUE FORD, INC.; JOHN FINGER MAZDA; JOHN FINGER MOTORS, INC.; JUD KUHN CHEVROLET; KEY INFINITI LLC; KEY MAZDA; KEY NISSAN, LLC; LAKE KEOWEE CHRYSLER-DODGE LLC; LAY- FISHER CHEVROLET, INC.; MCDANIELS ACURA OF CHARLESTON; MCDANIELS ACURA-PORSCHE; MIDLANDS HONDA; MILLER CADILLAC, INC.; MYRTLE BEACH CHEVROLET, INC.; MYRTLE BEACH CHRYSLER-JEEP, INC.; MYRTLE BEACH HYUNDAI-ISUZU; MYRTLE BEACH SUZUKI PALMETTO NISSAN, INC.; PERFORMANCE CHEVROLET-BUICK-GMC; PETERBILT OF FLORENCE; PORSCHE OF HILTON HEAD PRESTIGE MOTORCARS; PULLIAM MOTOR CO.; RALPH HAYES

TOYOTA, INC.; SATURN OF GREENVILLE INC.; SATURN OF SPARTANBURG; STEVE WHITE MOTORS OF SOUTH CAROLINA, INC.; STOKES AUTOMOTIVE, INC.; STOKES HONDA CARS OF BEAUFORT, INC.; STOKES HONDA NORTH CHARLESTON; STOKES ISUZU-KIA¬SUBARU; STOKES MAZDA, INC.; STOKES MITSUBISHI; STOKES MOTORS, INC.; STOKES VOLKSWAGEN; STOKES-BROWN TOYOTA; STOKES-CRAVEN AUTOMOTIVE, INC.; STOKES-CRAVEN CHRYSLER-JEEP-DODGE; STOKES-CRAVEN FORD; STOKES-TRAINOR CHEVROLET-OLD-PONTIAC-CADILLAC-BUICK; STOKES TRAINOR FORD; SUMMERVILLE FORD-MERCURY, INC.; SUZUKI OUTLET OF MYRTLE BEACH SC; TIDELANDS CHRYSLER DODGE; TIDELANDS FORD-LINCOLN-MERCURY; TOM HUNTER PONTIAC-BUICK-GMC, LLC; UPSTATE AUTOMOTIVE (CHEVROLET-CADILLAC); UPSTATE AUTOMOTIVE (ISUZU-KIA); UPSTATE AUTOMOTIVE (MITSUBISHI); UPSTATE AUTOMOTIVE (NISSAN); WRAY AUTOMOTIVE, INC.

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Civil Action No.: 06-CP-02-1230

HEATHER HERRON, NATALIE ARMSTRONG, ALISON DANNERT, MICHAEL RITZ, JULIE FREEMAN, CHRISTINE WATTS, MICHAEL BLEASE, MICHAEL WATTS, individually and for the benefit of all carbuyers whom paid "administrative fees" as described below to defendants,

Plaintiffs,

v.

CARMAX AUTO SUPERSTORES, INC., *et al.*,

Defendants.

RETURN TO PLAINTIFFS' MOTION TO AMEND OF DEFENDANTS, DICK DYER & ASSOCIATES, INC.; DICKSMITH MOTORS, INC.; DICK SMITH INFINITI, INC.; DICK SMITH NISSAN OF LEXINGTON, INC.; DICK SMITH NISSAN, INC.; DICK SMITH MOTORS OF AIKEN, INC. D/B/A DICK SMITH CHRYSLER-JEEP; DICK SMITH CHEVROLET, INC.; DICK SMITH MOTORS OF GREENVILLE, INC. D/B/A DICK SMITH MITSIBISHI; DICK SMITH CHRYSLER DODGE JEEP OF LUGOFF, INC.; DICK SMITH PONTIAC-GMC, INC.; and any affiliate which is properly named and served; HERITAGE LINCOLN MERCURY, INC.; MSA OF MYRTLE BEACH, INC. D/B/A ADDY'S HARBOR DODGE; STIVERS AUTOMOTIVE OF LEXINGTON, INC.; AND STIVERS AUTOMOTIVE OF COLUMBIA, INC.

INTRODUCTION

Dyer, Dick Smith, Heritage, Addy's Harbor Dodge, and Stivers oppose the Plaintiffs' Motion to Amend Complaint to add hundreds of parties on the grounds that the additional parties the Plaintiffs seek to add as Plaintiffs are the fruit of an improper search in violation of state and federal law. Under all of the circumstances, justice does not require that leave to amend be given.

BACKGROUND

In 2000, the General Assembly passed an amendment to the Consumer Protection Code to add S.C. Code Ann. § 37-2-307 which allowed motor vehicle dealers to charge closing fees. Dealers understood that this legislation settled, once and for all, previous questions over the propriety of charging closing fees raised in unsuccessful actions in *Fanning v. Fritz's Pontiac-Cadillac-Buick*, 322 S.C. 399, 472 S.E.2d 242 (1996) and *Ferguson v. Charleston Lincoln Mercury*, Inc., 349, S.C. 558, 564 S.E.2d 94 (2002).

On June 23, 2006, Richard A. Harpootlian, Esq. ("Harpootlian") submitted a Freedom of Information request to the South Carolina Department of Motor Vehicles ("SCDMV") seeking the following information:

> Private purchases of new or used automobiles in Spartanburg County during the week of May 1-7, 2006, including the name, address, and telephone number of the buyer, dealership where purchased, type of vehicle purchased, and date of purchase.

In his letter, Harpootlian stated:

> "I have plaintiffs who have complained of certain conduct as a result of their transactions with car dealers, conduct which I believe to be a potential violation of state law. I am attempting to determine if this is a common practice, and am accordingly submitting this FOIA request."

Harpootlian asserted that his request was in anticipation of litigation pursuant to the exception in 18 U.S.C. § 2721(b)(4) of the Driver's Privacy Protection Act of 1994 ("DPPA"). (Exhibit 1)

On August 24, 2006, Harpootlian submitted another Freedom of Information request to SCDMV. Therein, Harpootlian sought:

> Private purchases of new or used automobiles in Charleston County, Richland County, York County, Lexington County, and Greenville County during the week of May 1-7, 2006, including the name, address, and telephone number of the buyer, dealership where the vehicle was purchased, type of vehicle purchased, and the date of purchase.

Again, Harpootlian indicated that his request was in anticipation of litigation pursuant to the exception in 18 U.S.C. § 2721(b)(4) of the DPPA. (Exhibit 2)

On August 29, 2006, the Summons and Complaint was filed in this matter in Aiken County. The following were listed as attorneys for the Plaintiffs: Michael E. Spears; Gedney M. Howe, III; Harpootlian; and A. Camden Lewis ("Lewis") and his associate.

Named as Plaintiffs were Heather Herron ("Herron"), Natalie Armstrong ("Armstrong"), Alison Dannert, and Michael Ritz. Herron, upon information

and belief, is Harpootlian's paralegal. Armstrong, upon information and belief, is Lewis' paralegal.

Although Herron, Armstrong and the other two putative Plaintiffs alleged that each had purchased a single vehicle from a single dealer, fifty-one dealers were named as Defendants, forty-seven of which had sold no vehicle to any of the four Plaintiffs. Oblivious to S.C. Code Ann. § 37-2-307, and relying upon a twelve year old case from Ohio that predated both *Fanning* and *Ferguson*, the putative Plaintiffs alleged that closing fees charged by motor vehicle dealers were somehow illegal.

After the initial pleadings were served, counsel for various Defendants filed motions to dismiss. Among other defenses, lack of standing was asserted by dealers who had either sold no vehicles to any of the four Plaintiffs at all, or had only sold one vehicle to one of the four Plaintiffs.

On October 26, 2006, Harpootlian submitted a third Freedom of Information Act request to SCDMV. Therein, Harpootlian sought information concerning:

> Private purchases of new or used automobiles during the weeks of May 1, 2006 through May 14, 2006, including the name, address, and telephone number of the buyer, the type of vehicle purchased and the date of the purchase for the following South Carolina dealerships:

The list of dealerships consumed nearly eleven pages. Again, Harpootlian asserted that his request was made pursuant to the exception in 18 U.S.C. § 2721(b)(4) of the DPPA. This time the "in anticipation of litigation" language was omitted. (Exhibit 3)

On or about October 28, 2006, counsel for the Plaintiffs filed and served a Summons and a First Amended Complaint. Therein, four additional parties were included as Plaintiffs, including Michael Blease. Upon information and belief, Michael Blease is the father of Melanie B. Blease, another one of Lewis' paralegals, whose name and signature appear on the Certificate of Service attached to the First Amended Complaint. Although, Herron, Armstrong, Blease and the other five putative Plaintiffs had purchased a single vehicle from a single dealer, over two hundred dealers were added as Defendants. This time, the putative Plaintiffs acknowledged the existence of S.C. Code Ann. § 37-2-307 but read additional requirements into the statute which simply aren't there and asserted that dealers had violated the statute. Again, counsel for various Defendants filed motions to dismiss, asserting that the eight Plaintiffs had no standing to sue dealers with whom they had never conducted any business.

On January 3, 2007, Lewis sent thousands of solicitation letters to consumers all across the State of South Carolina. The letters specifically stated:

> We represent a group of *consumers* in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee". We believe that these fees are being charged in violation of South Carolina law. (emphasis added).
>
> We understand that you may have been charged one of these fees on your recent purchase of an automobile. **We obtained this information in response to a Freedom of infor-**

mation Act request to the South Carolina Department of Motor Vehicles. (emphasis in original).

In a letter to the Office of the Disciplinary Counsel dated January 9, 2007, counsel for the Plaintiffs indicated that among others, solicitation letters were forwarded to Angela Harrison ("Harrison"), Robert Bacon ("Bacon"), and Teresa Beck ("Beck"). (See Exhibit C to Joint Memorandum in Support of Defendants' Motion to Dismiss).

On January 19, 2007, January 22, 2007, and January 23, 2007, Harpootlian sent three additional Freedom of Information Act requests to SCDMV seeking similar information about new or used vehicles purchased during specified weeks in 2005 and 2006. (Exhibits, 4, 5 and 6).

Upon information and belief, on January 23, 2007, counsel for the Plaintiffs sent out a second batch of solicitation letters. On March I, 2007, counsel for the Plaintiffs sent out a third batch of solicitation letters. Again, these letters provided:

> We represent a group of *consumers* in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee". We believe that these fees are being charged in violation of South Carolina law. (emphasis added).
>
> We understand that you may have been charged one of these fees on your recent purchase of an automobile. *We obtained this information in response to a Freedom of Information Act request*

to the South Carolina Department of Motor Vehicles. (emphasis in original).

Among others, counsel for the Plaintiffs listed Joseph Day ("Day"), Jean Johnson Taylor ("Taylor"), Jerome B. Davis ("Davis"), John David Bishop ("Bishop"), and Jackquline Grove ("Grove") as individuals to whom the third solicitation letter was sent.

On March 7, 2007, the undersigned notified Lewis of his concern about the propriety of the continuing series of solicitation letters and the implications of S.C. Code Ann § 30-2-50 (1976). (Exhibit 7). In a letter dated February 16, 2007 [sic], Lewis acknowledged receipt of the undersigned's letter but indicated that he and his co-counsel were not covered by the statute. (Exhibit 8).

At a hearing in Bamberg, South Carolina on April 4, 2007, and upon information and belief, in a subsequent telephone conference call with counsel for the parties, the Court expressed concern about the standing issue. Thereafter, the series of solicitation letters resumed. (See letter dated May 8, 2007, attached as Exhibit No. 9).

On or about June 1, 2007, counsel for the Plaintiffs moved to file a Second Amended Complaint. Among the parties counsel proposed to add as Plaintiffs are Harrison, Bacon, Beck, Day, Taylor, Davis, Bishop, and Grove. Harrison now wants to sue Addy's Harbor Dodge; Bacon wants to sue Dick Dyer Toyota; Beck, Taylor, Davis, Bishop, and Grove want to sue Dick Smith dealerships; and Day wants to sue Heritage Lincoln Mercury. All eight of these putative Plaintiffs were identified by inappropriate Freedom of Information Act requests and all of them were contacted in violation of S.C. Code Ann. § 30-2-10, et seq. ("Family Privacy Protection Act of 2002" or "FPPA").

In a transmittal letter to the Court dated June 1, 2007, with copies of Plaintiffs' Motion to Amend Complaint and Amended Complaint Lewis stated:

> We hope this handles your concerns with regards to each Defendant not having a corresponding Plaintiff. (Exhibit 10).

LAW

Rule 7.3 of the Rules of Professional Conduct govern direct contact with prospective clients. Lawyers contacting prospective clients are required to include certain language in their written communications, state how the lawyer obtained the information prompting the communication, and also require that a representative copy be filed with the Commission on Lawyer Conduct. Counsel for Plaintiffs complied with these requirements. However, as Rule 7.2, Comment 1, warns, "Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching".

Rule 15(a), SCRCP provides in pertinent part:

> . . . a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given **when justice so requires** and does not prejudice any other party.

"Justice" is defined in Black's Law Dictionary, Eighth Edition as:

> The fair and proper administration of laws.

Ordinarily, motions to amend are addressed to the discretion of the circuit court, and whether a proposed amendment is in furtherance of justice is a matter to be determined by that court upon a review of all the circumstances. *Hall v. Woodward*, 30 S.C. 564, 9 SE 684 (1889).

18 U.S.C. § 2721 provides in pertinent part:

> **(a) In general** – A State department of motor vehicles and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity:
>
> (1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section
>
> * * *
>
> **(b) Permissible uses** – Personal information . . . may be disclosed as follows:
>
> (4) For use in connection with any civil, criminal, administrative or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, **investigation in anticipation of litigation**, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court. (emphasis added).

Acquiring personal information from the motor vehicle records for the purpose of finding and soliciting clients for a lawsuit is not a "permissible use" within the meaning of § 2721(b).

* * *

Congress did not intend that personal information in motor vehicle records would be used to contact persons to become plaintiffs in a lawsuit. . .

* * *

Section 2724 authorizes a private right of action against "[a] person who knowingly obtains, discloses,

or uses personal information from a motor vehicle record, for a purpose not permitted . . . [and makes the person who violates the DPPA] liable to the individual to whom the information pertains . . . , "without any showing that the person to whom the personal information pertains "suffered any adverse effect." (citation omitted). Thus, if a District employee discloses personal information in the motor vehicle records for the purpose of allowing solicitation of clients by a private attorney, that employee arguably would be vulnerable to a lawsuit, as would be the private attorney if he used the personal information to find clients for a class action lawsuit. *Wemhoff v. District of Columbia*, 887 A.2d 1004 (2005).

S.C. Code Ann. § 30-2-50 provides in pertinent part:

> (A) A person or private entity shall not knowingly obtain or use any personal information obtained from a state agency for **commercial solicitation** directed to any person in this State. (emphasis added).

S.C. Code Ann.§ 32-2-20 provides in pertinent part:

> All state agencies . . . must develop privacy policies and procedures to ensure that the collection of personal information pertaining to citizens of the State **is limited to such personal information required by any such agency, . . . and necessary to fulfill a legitimate public purpose.** (emphasis added).

"Legitimate public purpose" is defined in § 30-2-30(2) as a purpose or use which **falls clearly within the statutory charge or mandates of an agency** . . . (emphasis added).

"Commercial solicitation" is defined in § 30-2-30(3) as contact by . . . mail . . . for the purpose of . . . marketing a consumer . . . service. S.C. Code Ann. § 30-2-30(3) contains four exclusions, but none of those exclusions refer to solicitation letters from lawyers.

ARGUMENT

The facts surrounding this matter are not in dispute. In fact, all of the facts are documented on counsel's letterhead and/or filed in the Office of Disciplinary Counsel.

The personal information requested from SCDMV was intended to address Defendants' arguments and the Court's concern over the standing issue. The personal information obtained from SCDMV was secured in violation of the DPPA. *Wemhoff* makes it clear that Congress did not intend that personal information in motor vehicle records would be used to contact persons to become plaintiffs in a lawsuit, In fact, those persons now have potential claims against Plaintiffs' counsel for violation of DPPA.

Obtaining and using the personal information for commercial solicitation violated FPPA. The continued flow of solicitation letters after the FPPA was brought to Lewis' attention demonstrates that the personal information was knowingly used in violation of the statute.

To now reward the very conduct punishable by both the DPPA and the FPPA by freely giving leave to amend would make a mockery of the word "justice" under any definition.

CONCLUSION

Based upon the foregoing, Dyer, Dick Smith, Heritage, Addy's Harbor Dodge, and Stivers submit that the Plaintiff's motion to amend their Complaint to add hundreds of parties should be denied.

Signature on following page

Respectfully submitted,

J. GREGORY STUDEMEYER
Professional Corporation
/s/ J. Gregory Studemeyer
1804 Bull Street
Post Office Box 12201
Columbia, South Carolina 29211-2201
803-779-3363

Attorney for Defendants Dick Dyer & Associates, Inc.; Dick Smith Motors, Inc.; Dick Smith Infiniti, Inc.; Dick Smith Nissan Of Lexington, Inc.; Dick Smith Nissan, Inc.; Dick Smith Motors Of Aiken, Inc. d/b/a. Dick Smith Chrysler-Jeep; Dick Smith Chevrolet, Inc.; Dick Smith Motors Of Greenville, Inc. D/B/A Dick Smith Mitsibishi; Dick Smith Chrysler Dodge Jeep of Lugoff, Inc.; Dick Smith Pontiac-GMC, Inc.; Heritage Lincoln Mercury, Inc.; MSA of Myrtle Beach, Inc. d/b/a Addy's Harbor Dodge; Stivers Automotive of Lexington, Inc.; and Stivers Automotive of Columbia, Inc.

Columbia, South Carolina

July 27, 2007

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

[Filed Aug 01 2007]

Case No. 2006-CP-02-1230

HEATHER HERRON, *et al.*,
Plaintiffs,

vs.

DEFENDANT CAR MAX AUTO SUPERSTORES, INC., *et al.*,
Defendants.

ORDER DENYING MOTIONS TO DISMISS

This matter comes before the Court by way of Motions to Dismiss by the defendants on the following grounds: (1) lack of standing of the plaintiffs; (2) Rule 23, S.C.R.C.P. and its relationship with S.C. Code Ann. § 56-15-110(2); and (3) failure of the plaintiffs to plead civil conspiracy adequately. These motions were heard before the Court in Bamberg, South Carolina on April 4, 2007.

This action was initiated on August 21, 2006, and the present Amended Complaint before the court alleges three causes of action:

1. Violation of S.C. Code Ann. § 56-15-10;
2. Civil Conspiracy;
3. Declaratory judgment to determine rights and legal relations under S.C. Code Ann. § 56-15-10 and/or S.C. Code Ann. § 37-2-307.

A motion to dismiss a claim pursuant to Rule 12 must be considered solely on the basis of allegations set forth on the face of the complaint in question. The motion will not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. A judgment on the pleadings is considered to be a drastic procedure by our courts. Therefore, pleadings in a case should be construed liberally, and the trial court must presume all well pled facts to be true so that substantial justice is done between the parties. *Overcash v. South Carolina Elec. and Gas Co.*, 364 S.C. 569, 614 S.E.2d 619, 620 (S.C. 2005).

"All properly pleaded factual allegations are deemed admitted for the purposes of considering a motion for judgment on the pleadings." *Hous. Auth. of the City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 588 S.E.2d 617, 620 (Ct.App. 2003).

"The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. . . . The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Doe v. Marion*, __ S.C. __, 645 S.E.2d 245, 247-48, 2007 W.L. 1321978 (S.C. 2007).

Applying these principles to the Amended Complaint before the Court, the Court finds first, that the Amended Complaint sufficiently pleads facts supporting standing of the plaintiffs to proceed under the three causes of action pled. Second, at this stage of the proceedings there are sufficient allegations of civil conspiracy in the Amended Complaint to avoid dismissal.

Concerning the relationship between S.C.R.C.P. 23 and S.C. Code Ann. § 56-15-110(2), I find that Section 56-15-110(2) creates a substantive right. Because 1985 Act 100 (the Act enacting the Rules of Civil Procedure) is inapplicable to substantive rights, I find that the 1985 Act neither repealed S.C. Code Ann. § 56-15-110(2) nor required that a complaint asserting rights under § 56-15-110(2) include a requirement that the plaintiff plead and prove the class certification requirements of S.C.R.C.P. Rule 23.

This Order is made in the framework of Rule 12(b)(6) motions and is based solely upon the pleadings. After the facts are developed in discovery, the defendants are free to reassert at a later date any or all of the issues addressed in this Order.

AND IT IS SO ORDERED.

/s/ Doyet A. Early, III
The Honorable Doyet A. Early, III
Judge of the Second Judicial Court

July
~~June~~ 31, 2007
Bamberg, S.C.

Form 4

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

JUDGMENT IN A CIVIL CASE

THE COURT OF COMMON PLEAS

Case No. 06-CP-02-1230

MC ____ JR ____

Heather Herron, et al

PLAINTIFF(s)

CarMax Auto Superstores Inc.

DEFENDANT(s)

CHECK ONE:

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ ACTION DISMISSED (*CHECK REASON)*: ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ ACTION STRICKEN (*CHECK REASON)*: ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

IS ORDERED AND ADJUDGED: ☑ See attached order, ☐ Statement of Judgment by the Court:

Dated at _____ South Carolina, this _____ day of _____, 20__.

_____
PRESIDING JUDGE

This judgment/order was entered/filed on the 31 day of July, 2007 and a copy mailed/hand-delivered/boxed this 1 day of August, 2007 to attorneys of record or to parties (when appearing pro se) as follows:

_____	_____
_____	_____
See Attached List	_____
_____	_____
ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)

/s/ Liz Godard
CLERK OF COURT

By: /s/ Barbara Riggs
DEPUTY CLERK

IN THE COURT OF COMMON PLEAS
OF THE SECOND JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

06-CP-02-1230

HEATHER HERRON, *et al.*,
Plaintiffs,

vs

CAR MAX AUTO SUPERSTORES INCORPORATED, *et al.*,
Defendants.

JULY 31, 2007
AIKEN, SOUTH CAROLINA

BEFORE: The Honorable Doyet A. Early, III

APPEARANCES:

FOR THE PLAINTIFF

A. Camden Lewis, Esquire
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FOR THE DEFENSE:

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Greenville, SC 29602

* * *

[3] THE COURT: I have ruled on the 12(b)(6). I asked for a proposed order. I got an order from the Plaintiffs. I got a lot of complaints from the Defendants. I got a call from Mr. Hamm who said he would like to have a meeting before I sign the order. So, I really don't—is that basically what we are here for Mr. Hamm?

MR. HAMM: No, sir. We're here on the plaintiffs' motion to amend.

THE COURT: All right.

MR. HAMM: And that's going to—whatever ruling you make on that will have an impact on a lot of those other issues. I would ask the court to go ahead and address the motion to add additional plaintiffs and to amend what Mr. Lewis has included in his new pleadings.

THE COURT: I got the motion to amend subsequent to the oral ruling on the 12(b)(6).

MR. HAMM: That is correct. We can address—I mean, we have previously, in our calls to the court, expressed concern about the order submitted to the court in response to your oral directive during that

conference call. We expressed concern that the proposed order submitted by the plaintiffs was at least to our understanding, far broader and more comprehensive than what we understood the court to say. We understood the court to tell us that at this stage of the pleadings, you are not prepared to dismiss based on the 12(b)(6) motion since you were constrained to view the pleadings in a manner most favorable to [4] the plaintiffs. We indicated we are aware of that and you indicated that you were going to deny all motions to dismiss at this point. We have, I think, said all that we can say to you, your honor. You are aware that we have—defense counsel has submitted a number of proposed orders. I know Mr. Grimball has, I submitted a brief, I know Mr. Martin did and probably others that don't come to mind at the moment, and I think we probably, at this point, we probably advise the court of our opinions and it's up to this court to make a determination, your honor.

THE COURT: Well, like I said, I've orally ruled and I have withheld signing the actual order so I could listen to y'all, other than what you've sent me, and I will continue with my ruling. My ruling stands, obviously. I have signed today an order dismissing the motion to dismiss, a very benign, bare-boned order simply saying that they comply with the rules and I made a ruling on the relationship between the South Carolina rules of civil procedure 23 and the code §56-15-110(2) and in that I found 56 created a substantive right and rule 23 was not required to move forward in this case. It's a two-page order, and to be quite honest with you, it was offered by Mr. Grimball and I adopted his order. I will not sign the long order that the plaintiffs submitted to me because it's simply 12(b)(6) and so that's where we stand.

MR. HAMM: Thank you, your honor.

THE COURT: The next thing on the plate was I received—

* * * *

[23] Ferguson says it is a fraud case. With fraud, you've got to prove reliance and that requires an individual test of every transaction. I think we'd stop with that eventually, but I'd be happy if they tried to get it certified as a rule 23.

THE COURT: Thank you, Mr. Grimball.

MR. GRIMBALL: Thank you.

MR. NESS: Next on the list is Greg Studemeyer, your honor.

THE COURT: Mr. Studemeyer. Your office called yesterday. I did receive that while I was on vacation and I did receive your exhibits.

MR. STUDEMEYER: Thank you, your honor. May it please the court. I'm sure that whenever you accepted the position that you took that you realized there would be some days that would probably be more difficult than others. There are going to be some decisions more difficult than others. In this particular set of circumstances, I think counsel for the plaintiff could relieve the court of some of that burden by accepting responsibility for what has already been done and withdraw their motion to amend.

Your honor, I represent dealers from Myrtle Beach, Moncks Corner, Columbia, Greenville and Lexington and one in Aiken. The one in Aiken, there is no corresponding plaintiff for. The one in Lexington, there is no corresponding plaintiff for. Some of these gentlemen you see in the court, your honor, they go to

work at 5:00 in the morning. Some of them work until 9:00 at night. Some of them work six days a week. All of them provide jobs for [24] thousands of people. In this courtroom you are seeing a representation of tens of thousands of jobs. These guys provide jobs, they provide health insurance for families all over the State of South Carolina.

My clients have questions, your honor. They want to know, "why are we being sued for something the legislature approved." They want to know, "why they are being sued in Aiken." They want to know, "are lawyers allowed to get personal information from the DMV to solicit business when we can't do that." your honor, the conduct—

THE COURT: Mr. Studemeyer, none of that is before me today. This is simply on a motion to amend at this point.

MR. STUDEMEYER: Your honor, if I could be heard on that, I think I can bring it into focus for you. I cited a case in my memorandum called *Hall versus Woodward*. That case says—and Mr. Lewis and I are in agreement on this. He talked about justice. I think he mentioned the word several times in his remarks. Justice appears in rule 1 and justice appears in rule 15. It says you can amend the pleadings when justice so requires. And *Hall versus Woodward* says when a motion to amend is before the court in the furtherance of justice that the court should take into consideration all surrounding circumstances. Your honor, I believe this is clearly before you and I'm asking you to let me speak to that.

THE COURT: Go ahead.

[25] MR. STUDEMEYER: Your honor, the conduct in this case could not be better documented. Attached

to the defendants' joined memorandum in support of the motion to dismiss, there is a letter to the office of disciplinary counsel. It was required by the rules of professional conduct filed by the plaintiffs' counsel. Attached to that letter is a sample of a solicitation letter and following that is a list of over twenty-two hundred names and addresses that plaintiffs' counsel obtained from the department of motor vehicles. That was the first letter that we know about. There have been a number of F-O-I requests, five that I know of. There have been a number of mailings. I think, by last count, the total number of solicitation letters was in the range of ten or eleven thousand. Your honor, the exhibits attached to my return that I submitted to you, documents exactly what was done here. The—whenever this lawsuit got filed back last August, every defense lawyer in this courtroom raised the issue of standing. And that issue of standing hung out there for about thirty days or so and then there was a F-O-I request to the department of motor vehicles to find out what the names and addresses of people who bought during this particular week or that particular week, so the series of solicitation letters began. Whenever we had a hearing before your honor in April, the issue of standing, that's all we talked about for hours. And I believe the court—

THE COURT: Well, why are we continuing to talk about that?

[26] I've already ruled on that.

MR. STUDEMEYER: We're continuing to talk about it, your honor, because I'm talking about it in the context of all the surrounding circumstances in the interest of justice. And what I'm suggesting to your honor is this, the court raised the issue, the court raised the sole concern after the defense had

raised in the defenses' standing and the court announced, "I'm concerned about this issue of standing." I didn't get to participate in the conference call that took place after that, but it is my understanding—

THE COURT: Now, wait a minute. Anybody could have participated in that. I had an agreement with everybody and y'all all agreed that I would speak with Mr. Hamm and Mr. Martin. I don't want you coming in here complaining about you weren't in on a conference call.

MR. STUDEMEYER: I'm not complaining. What I do want to say is this, your honor.

THE COURT: I've been as fair as I can be in this thing.

MR. STUDEMEYER: What I wanted to say is this. It's my understanding that began during the conference call. The court raised its own concerns about the issue of standing, there not being a plaintiff for every defendant.

THE COURT: I have raised that consistently. That's not a secret.

MR. STUDEMEYER: Your honor, the law in this case could not [27] be more clear. The federal statute in title 18, I noticed in the memorandum I got last night that there is some suggestion that our position was that the department of motor vehicles somehow violated that statute. That's not true. That statute prohibits anyone from using them for the purpose of litigation. It's an 18 USC §2722 and prohibits use.

The *Wemhoff* case from the District of Columbia, your honor, I suggest is right on point. What court, other than a court in Washington, D.C., would have a

better understanding of what Congress' intent was when a federal privacy statute was practiced. The *Wemhoff* case is clear that—

THE COURT: Are you suggesting that the plaintiffs were doing something illegal when they did the F-O-I's and when they got these letters from soliciting?

MR. STUDEMEYER: Your honor, I've done my best to point out what the facts are and what the law is and I'll let someone else connect the dots. But I believe the law is clear, that the state act that I talked about, the family privacy protection act is equally clear. You can't use the DMV records to solicit business. Now, the position I've heard from them is, we don't provide consumer services, we're professionals. And so, the FPPA does not apply to us. Your honor, let me cite a 1938 case involving our Congress for the proposition that the practice of law, medicine, industry or professions and corporations and businesses and partnerships cannot engage in the practice of a profession. If [28] you turn the page on their brief you'll see signature blocks for three PA's and one limited liability partnerships. Your honor, I suggest to the court that maybe there was a time when the practice of law was a profession, but things have changed. There was a time when nobody would think about paying a dollar for a bottle of water. There was a time when parents didn't have to explain to their four-year-old children what Viagra was that they saw on a TV commercial. There was a time—

THE COURT: Mr. Studemeyer, you're losing me. I'm sorry. I don't understand where you're coming from on a motion to amend.

MR. STUDEMEYER: Your honor, I'm winding up—what I'm saying is this, in the context of all the surrounding circumstances, I just want to point out to the court that the court should not ignore, and I'm not suggesting that the court is, but what I'm asking the court to do is to deal with what we're looking at right in front of us. That there is an apparent violation with regard to privacy rights and I'm suggesting, your honor, that that should not go unnoticed if the court is going to take all surrounding circumstances into consideration to determine whether or not an amendment is in the interest of justice.

Your honor, from the beginning of litigation there has always involved an element of hope. The—I believe there was some hope that this standing argument could be addressed by the freedom of information act request. I believe that there was an element of hope that if ten thousand letters went out that some [29] of those people would sign up to be litigants and overcome the standing issue. Your honor, I would ask that the court just simply—following *Hall versus Woodward* and rule 15 where it talks about justice so requires and rule 1 talks about justice—that the court take into consideration what was done in this case to try to satisfy an issue of standing that was raised by counsel and also those two motions. Thank you.

MR. NESS: Mr. Martin, we're aware of the time passing. I just spoke to counsel about it.

MR. MARTIN: Good Afternoon, your honor.

THE COURT: Mr. Martin, how's everything in Greenville?

MR. MARTIN: Very well, sir. Very well. And—

THE COURT: Have you got those fighting doctors back together?

MR. MARTIN: Actually, the divorce is final and they're now practicing and not fussing with each other. Thanks to you everything's finished.

I'm here representing eighty-four car dealers. We're in twenty-two counties. We employ about ten thousand people. We are now faced, in these twenty-two counties of coming to Aiken because they want to add over two hundred and fifty new plaintiffs. Under rule 15, the only case in South Carolina that says you can't do that, they cite federal case law to you saying federal case law allows you to do it, but not one state case. You asked, isn't there another case that talks about it? Don't you

* * * *

[36] Information and use it for your own purposes. And the court of appeals in the District of Columbia says that lawyers can't go fishing for clients by getting this kind of information. All those people are now here before you, the fruit of the poison tree before you. How can you just sign an order saying, all right, we'll amend it and have this tremendous prejudice to all of our dealers who have no right to get that information? They would love to have the information of who is buying what car and when they bought it. It would be an incredible advantage to them, but they have no right because it is improper. The statute says thou shalt not do it. Well, it's been done. It's been admittedly done and the fruit of that tree is now in this courtroom and they are saying, "Well, hey, the cat's out of the bag. Let's make them all pay." that's not fair. The prejudice is monumental. The *Jaguar* case as I told you is exactly on point.

Gardner versus Newsome. There's nothing wrong. If they really think they've been illegally charged a fee for that transaction and that occurrence, it's to be analyzed and all the arbitration cases, I've got about forty-six of my clients with an arbitration clause, the Supreme Court in *Simpson* says every single one of your arbitration clauses has to be analyzed separately, individually. What did it say? Who was the plaintiff? One by one. Well, how can we possibly do this if it's a mass action that becomes more massive as the day goes by? You see, it just creates an incredible mess.

I was here before you and said that rule 23 should be the [37] way you should do it. You respectfully disagreed with me and I appreciate that. You ruled and I found out today that you now say there is a substantive right. But, how do you make the rules under that? What's fair? We know that rule 15 applies, because our friends have asked to amend under rule 15 and so that's okay. They're not saying 110(2) kicks out rule 15, it only kicks out rule 23. But how do you go about it? Well, we've got precedent. The Court of Appeals and Judge Pleicones now on the Supreme Court, has said you can't add additional plaintiffs. You can't do it. There's not one case in front of you that says you can. Is there prejudice? You better believe it. The reason why this room is filled with our clients is because they want you to know how prejudicial this is. Most of my clients have very little insurance. They have twenty-five thousand bucks and that's it and it's going to be gone in a New York minute if this case is allowed to have two hundred and fifty-eight plaintiffs. Just think about that. Two hundred and fifty-eight depositions we'd have to take. There's another million dollars gone. And they're in an industry that is getting really hit

hard, really hit hard. We have a rule that tells you how to play it. We have precedent that tells you how to play it. It's clear as a bell. This is the most unusual case of my thirty years of practicing law. Let's recognize it. And if you want to be second guessed or have somebody upstairs take a look at what you do, deny the motion and let the Supreme Court make the decision if you're wrong. But, if you go ahead and sign it, the cat's

* * * *

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

[Received Aug 24, 2007]

C.A. No.: 06 CP 02-1230

HEATHER HERRON, *et al.*,
Plaintiffs,

vs.

CARMAX AUTO SUPERSTORES, INC., *et al.*,
Defendants.

This matter came before me on July 31, 2007 in Aiken, SC on Motion to Amend the Amended Complaint. On or about June 2, 2007, Plaintiffs filed and served a Notice of Motion and Motion to Amend Complaint with a proposed Second Amended Complaint. Therein, Plaintiffs, *inter alia*, moved to amend their First Amended Complaint pursuant to Rule 15, SCRCP in order to join 246 parties as additional plaintiffs and to add additional allegations against the named defendants.

Defendants opposed the motion. After considering Plaintiffs' motion and memorandum, Defendants' memoranda, and oral arguments presented at the hearing, Plaintiffs' Motion to Amend is DENIED for the reasons set forth below.

Under Rule 15(a), SCRCP, any amendment by the Plaintiffs would require leave of this Court or written consent of the adverse parties. According to this Rule, leave of this Court shall be freely given when justice so requires and does not prejudice any other party.

Plaintiffs seek to add the 246 parties in order to address the standing issue raised by Defendants in their Motions to Dismiss. According to *Valentine v. Davis*, 319 S.C. 169, 172, 460 S.E.2d 218, 219 (S.C. App. 1995), Rule 15, SCRCP, does not allow the existing plaintiffs to add new plaintiffs to the case in order to assert a claim against the defendant. Rule 15(a) only permits an existing plaintiff to add, modify, delete, or change claims against an existing defendant. Rule 15(b) addresses amendments to conform to the evidence presented at trial. Rule 15(c) deals with relation back of amendments. None of these subsections addresses a motion to add a plaintiff or multiple plaintiffs as contemplated in this case. The *Valentine* case is directly on point and is the principle of law governing this matter.

In addition, the practical and equitable aspects of the Plaintiffs' Motion must be considered. As in *Valentine*, this Court examined the manageability of this case in the interests of justice as is required by Rule 15(a). The Defendants have asserted and argued the existence of prejudice if the Plaintiffs' Motions is granted. I find that prejudice exists for the defendants if the Plaintiffs' Motion is granted.

For the reasons set forth above, the Plaintiffs' Motion to Amend the Amended Complaint is denied.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Amend is DENIED.

AND IT IS SO ORDERED.

/s/ Doyet A. Early, III
Doyet A. Early, III
Resident Judge, Second Judicial Circuit

Bamberg South Carolina
August 21, 2007

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Case No. 2006-CP-02-1230

HEATHER HERRON, *et al.*,
Plaintiffs,

v.

DICK DYER & ASSOCIATES, INC., *et al.*,
Defendants.

ORDER ON PLAINTIFFS' RULE 41(a) MOTION TO VOLUNTARILY DISMISS CERTAIN DEFENDANTS AND DEFENDANTS' RULE 59(e) MOTION TO RECONSIDER THE DENIAL OF THEIR MOTIONS TO DISMISS ON CERTAIN GROUNDS

I. PROCEDURAL POSTURE AND FACTUAL BACKGROUND

Plaintiffs filed their original Complaint against certain Dealers in Aiken County on August 29, 2006, with four Plaintiffs suing 51 motor vehicle dealerships located in thirteen counties. Plaintiffs filed a "Corrigenda" correcting the original Complaint on September 1, 2006. Plaintiffs filed their First Amended Complaint in this case on October 31, 2006, with eight Plaintiffs suing some 324 dealerships ("Defendants" or "Dealers") located in forty-one counties. Each named Plaintiff alleges he or she bought one vehicle from a single Dealer.

As set forth more fully in the First Amended Complaint, Plaintiffs allege among other things that (1) Defendants charged closing fees in violation of the South Carolina Regulation of Manufacturers, Distributors and Dealers Act (" the Dealers Act") contained in South Carolina Code Ann. §§ 56-15-10 to -600 (2006), and failed to comply with requirements in South Carolina Code Ann. § 37-2-307 (2002) (the "Closing Fee Statute"); (2) Defendants engaged in a civil conspiracy; and (3) Plaintiffs request that the circuit court issue a declaratory judgment finding Defendants' practices illegal and granting other relief.

Defendants moved to dismiss the First Amended Complaint based on lack of standing; improper joinder; Rules 12(b)(1), (2), (3) and (6), SCRCP; failure to plead the requirements of Rule 23, SCRCP; and other grounds.

This Court denied Defendants' various motions to dismiss by Order filed August 1, 2007. Defendants on August 10 and 13, 2007, timely served two Joint Motions to Amend or Reconsider the denial of the motions to dismiss pursuant to Rule 59(e), SCRCP.

Plaintiffs on October 11, 2007, moved pursuant to Rule 41(a), SCRCP, to voluntarily dismiss without prejudice all parties named in the First Amended Complaint, filed October 31, 2006, except for the seven named Plaintiffs and the seven Defendants from which those Plaintiffs purchased a vehicle.[1]

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[1] The eighth named Plaintiff in the First Amended Complaint, Alison Dannert, has settled her claims against Defendant CarMax Auto Superstores, Inc., and is no longer involved in this litigation.

A hearing was held before this Court on November 30, 2007, on Plaintiffs' motion to voluntarily dismiss certain Defendants and Defendants' motions to reconsider. Numerous lawyers for Plaintiffs and Defendants were present, with A. Camden Lewis presenting the Plaintiffs' motion and arguments and James Y. Becker, Bradford N. Martin and Steven W. Hamm presenting Defendants' motions and arguments.

This case is related to two other cases before this Court: *Janet L. West-Cox et al. v. Cale Yarborough Honda. Inc. et al.*, Case No. 2007-CP-02-1154 (Complaint filed in Aiken County on Aug. 20, 2007) (the *West-Cox* case); *Howard Adams et al. v. Action Ford Mercury, Inc. et al.*, Case No. 2007-CP-02-1232 (Complaint filed in Aiken County on Sept. 4, 2007) (the *Adams* case).

II. PLAINTIFFS' MOTION TO VOLUNTARILY DISMISS CERTAIN DEFENDANTS

The majority of Defendants apparently have consented to Plaintiffs' Rule 41(a) motion to dismiss. Some Defendants have opposed this motion. I find that granting Plaintiffs' Rule 41(a) motion to dismiss serves judicial economy and is in accord with Rule 1, SCRCP, and thus, Plaintiffs' motion is granted. All Defendants in this case are hereby dismissed without prejudice pursuant to Rule 41(a)(2), SCRCP, except the following:

1. Heather Herron v. Land Rover of Columbia;
2. Natalie Armstrong v. Galeana Chrysler Jeep, Inc.;
3. Michael Ritz v. Taylor Investments, Inc. d/b/a Taylor Toyota, Inc.;

4. Julie Freeman v. J.L.H. Investments, d/b/a Hendrick Honda of Easley;[2]

5. Christine Watts v. Sonic Automotive 2752 Laurens Rd., Greenville, Inc. d/b/a Century BMW;

6. Michael Blease v. Dick Dyer & Associates, Inc.; and

7. Michael Watts v. Toyota of Greenville, Inc.

Defendants, including those which have consented to Plaintiffs' Rule 41(a) motion to dismiss and those which have not, have moved or reserved any and all rights they may have to seek the payment of their attorney's fees and costs by Plaintiffs. Defendants also have reserved any and all rights they may have with regard to any applicable statute of limitations if Plaintiffs should refile this lawsuit against them. I express no opinion on these motions or issues and reserve ruling on them until a later date. Before I rule on such motions, the parties will be allowed to prepare memoranda and affidavits in support of or opposition to the motions, and present their arguments at a hearing.

III. DEFENDANTS' MOTIONS TO RECONSIDER

I grant Defendants' motions to reconsider in part and modify my earlier ruling on the issue of a Plaintiff's standing to sue Dealers with whom he or she did not transact any business. I deny Defendants' motions to reconsider in part, reaffirming my earlier rulings on the issues of the applicability of Rule 23,

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[2] The First Amended Complaint incorrectly asserts that Ms. Freeman purchased a vehicle from Rick Hendrick Honda Cars Co.

SCRCP. I reserve any rulings on the issues of improper joinder and venue until a later time.

A. STANDARD FOR DECIDING MOTION TO DISMISS

A trial judge may dismiss a claim when the defendant demonstrates the plaintiff's failure to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Rule 12(b)(6), SCRCP. When considering the motion to dismiss for failure to state a cause of action, the trial court must base its ruling solely upon the allegations made on the face of the complaint. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). If the facts and inferences drawn from the facts alleged in the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a cause of action is improper. *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987). When it is determined that a plaintiff does not have standing to prosecute, the court must dismiss the action. *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994).

B. STANDING

In my Order filed August 1, 2007, denying Defendants' motions to dismiss, I ruled that the First Amended Complaint sufficiently pled facts supporting standing of the Plaintiffs to proceed under the three causes of action in the First Amended Complaint, and that at this stage of the proceeding, there were sufficient allegations of civil conspiracy in the First Amended Complaint to avoid dismissal. I now reconsider and clarify my ruling on the issue of standing, reversing it to a limited extent.

Defendants' motion to dismiss is granted with regard to a named Plaintiff's claims against "no-sale Defendants," i.e., Defendants with which a named Plaintiff did not transact any business. Otherwise, Defendants' motion to dismiss on this ground is denied.

In short, I conclude that a named Plaintiff has standing to pursue all three causes of action, on behalf of himself or others, against the Defendant from which that particular Plaintiff purchased a vehicle. However, a named Plaintiff does not have standing to sue, on behalf of himself or others, any Defendant with which he did not transact any business. A named Plaintiff may later gain standing to sue Defendants with which a named Plaintiff did not transact any business by presenting evidence sufficient to create a genuine issue of material fact that particular Defendants conspired on the charging of the closing fee with the Defendant from which the named Plaintiff purchased a vehicle.

Standing is a "fundamental requirement for instituting an action," without which "[n]o justiciable controversy is presented." *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 412-13 (Ct. App. 1994). As a result, upon determining a plaintiff has no standing to prosecute a cause of action, the court must dismiss the action. *Id.*

To have standing, a party must prove all elements that constitute the "irreducible constitutional minimum of standing":

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal

> connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Sea Pines Assn. for the Protection of Wildlife, Inc. v. S.C. Dept. of Nat. Resources, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (internal quotes and ellipses omitted). An injury in fact is a particularized harm that affects the plaintiff in a personal and individual way. *Id.* at 602, 550 S.E.2d at 292. Plaintiffs bear the burden of demonstrating each of the three elements. *Sea Pines*, 345. S.C. at 601, 550 S.E.2d at 291.

A plaintiff may not sue a defendant with whom he or she has had no dealings because the law precludes a plaintiff from suing a defendant "unless the plaintiff has suffered an injury at the hands of the defendant." *Gardner v S.C. Dept. of Revenue*, 353 S.C. 1, 23 n.14, 577 S.E.2d 190, 201 n.14 (2003). In *Blum v. Yaretsky*, 457 U.S. 991 (1982), the United States Supreme Court explained that

> [i]t is not enough that the conduct of which the plaintiff complains will injure *someone*. The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.

Id. at 999 (emphasis in original).

In the present case, when considering solely the allegations made on the face of the First Amended Complaint, each named Plaintiff has sustained no injury from any of the Dealers with which he or she did not conduct any business, and he or she is not in immediate danger of a direct injury from any of these Dealers. A named Plaintiff cannot establish standing because there simply is no causal connection between the injury alleged (a closing fee illegally charged by a Dealer that sold a vehicle to an individual Plaintiff) and the challenged actions of the other Dealers (which did not sell a vehicle to Plaintiff). The injury suffered by each named Plaintiff is fairly traceable to the challenged action of only the Dealer from which he or she bought a car, not every other Dealer in the state. A decision in the named Plaintiff's favor would not redress the injuries allegedly suffered by people who bought vehicles from other, unrelated Dealers. Furthermore, each named Plaintiff has a personal stake in an action only against the Dealer with which he or she did transact business. The mere fact that other Dealers may charge a closing fee simply does not give Plaintiffs standing to sue every Dealer in the state that charges such a fee.

Accordingly, a named Plaintiff does not have standing to sue, on behalf of himself or others, any Defendant from which a Plaintiff did not purchase a vehicle or transact any business. Stated conversely, a named Plaintiff who alleges he or she has been charged an illegal motor vehicle closing fee has standing to sue, on behalf of himself or others, only the Defendant which sold a vehicle to that particular Plaintiff. As explained further in Section E below, a named Plaintiff may gain standing to sue other Defendants with which he or she did not transact any business if that Plaintiff, during discovery, obtains

evidence sufficient to raise a genuine issue of material fact on whether certain Defendants engaged in a civil conspiracy with regard to the charging of a closing fee.

2. Impact of S.C. Code Ann. § 56-15-110(2) on standing

South Carolina Code Ann. § 56-15-110(2) (2006) does not confer standing for Plaintiffs to sue Dealers with which they did not conduct any business. Under § 56-15-110(1), "any person *who shall be injured in his business or property* by reason of anything forbidden in this chapter may sue therefor [sic] in the court of common pleas." (Emphasis added.) This subsection simply gives an injured person a right to sue a Dealer with which he or she did business for damages, but in no way indicates that person may sue every other Dealer in South Carolina. To be liable under this provision, a Dealer must have participated in wrongdoing against a Plaintiff who bought a vehicle from that Dealer. *Jackson v. Speed*, 326 S.C. 289, 302, 486 S.E.2d 750, 756 (1997); *Rowe v. Hyatt*, 321 S.C. 366, 468 S.E.2d 649 (1996). The named Plaintiffs were not injured in their person or property by dealers with which they did no business. Therefore, Plaintiffs have no claim under § 56-15-110(1) against those Dealers with which they did no business.

This ruling is consistent with the South Carolina Supreme Court's decision in *Gardner v. S.C. Dept. of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), in which the plaintiffs brought an action for violations of the South Carolina Debt Setoff Act and, like the Plaintiffs in this case, they sued defendants with which they had not conducted any business. The plaintiffs alleged that public agencies which collected debts by

seizing an individual's state income tax refund under the Debt Setoff Act had failed to comply with the Act's notice provisions. The plaintiffs sued defendant class members that had *not* collected debts from them, but had collected debts from other person's using the Act. The Supreme Court held that the plaintiffs could not sue persons who did *not* collect debts from them and at whose hands they had suffered no injury. *Gardner*, 353 S.C. at 23 n.14, 577 S.E.2d at 201 n.14.

3. Impact of civil conspiracy claim on standing

The mere assertion of a civil conspiracy cause of action does not confer standing on Plaintiffs to sue Dealers with which they did not transact business. Any use of the conspiracy allegation to circumvent standing requirements would involve applying the "juridical links doctrine."

The South Carolina Supreme Court has expressly rejected the "juridical links" doctrine, finding that it runs counter to previous decisions that a plaintiff may not sue a defendant unless the plaintiff has suffered an injury at the hands of the defendant. *Gardner*, 353 S.C. at 23 n.14, 577 S.E.2d at 201 n.14; *Edisto Fleets, Inc. v. S.C. Tax Commn.*, 256 S.C. 350, 182 S.E.2d 713 (1971) (plaintiff cannot maintain a class action where record indicates he was not directly harmed by defendant's actions); *Furman Univ. v. Livingston*, 244 S.C. 200, 136 S.E.2d 254, 256 (1964) (only a taxpayer directly affected by erroneously paying taxes has a right to seek a refund).

Given the Supreme Court's unconditional rejection of the juridical links doctrine, Plaintiffs cannot now rely on a conspiracy allegation to circumvent the

standing requirements. Plaintiffs therefore lack standing at this time to bring any cause of action against Dealers with which they did not transact any business.

4. Impact of declaratory judgment action on standing

The mere assertion of a declaratory judgment action does not confer standing on Plaintiffs to sue Dealers with which they did not transact business.

The Declaratory Judgment Act provides:

> [a]ny person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

S.C. Code Ann § 15-53-30 (2006). Despite the Act's "broad language, it has limits." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004). An adjudication that "would not settle the legal rights of the parties would only be advisory in nature and, therefore, would be beyond the intended purpose and scope of [the Act.]" *Id.*

To state a cause of action under the Declaratory Judgment Act, a party "must demonstrate a justiciable controversy." *Id.* A justiciable controversy exists "when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." *Graham*

v. State Farm Mutual Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995). Additionally, in declaratory judgment actions "[t]he interest of the parties . . . to the subject matter of the controversy must be more than merely general. It must be a substantial, direct, and legally protected present interest in the relief sought." *Quinn v. City of Columbia* 303 S.C. 405, 407-408, 401 S.E.2d 165, 167 (1991) (holding that subdivision residents lacked standing under the Declaratory Judgment Act to challenge the city's annexation of the subdivision because the residents did not own real property in the subdivision and, therefore, had no "legally protected present interest").

Because there was no transaction or interaction between the named Plaintiffs and Dealers with which they did no business, Plaintiffs' legal interest with respect to such dealerships is neither concrete nor legally protected and any declaratory judgment would be merely advisory in nature. Plaintiffs' declaratory judgment cause of action is, therefore, an impermissible basis to establish standing against a Dealer with which they did not transact any business.

5. Impact of public interest exception

To establish public interest standing, the reported cases indicate that a government entity or public actor must be a defendant. *See e.g. Davis v, Richland County Council*, 372 S.C. 497, 642 S.E.2d 740 (2007) (holding county recreation commission members had public interest standing in suit against county regarding the constitutionality of an act changing the authority to appoint commission members, and citing several cases involving government entities as the defendant). In this case, there is no dispute with governmental entities, public officials, or public

bodies. Instead, the lawsuit is an action by private individual plaintiffs against private corporate defendants. Given the well-established general principles on standing outlined above, I find that the public interest exception in this case should not be applied to allow a named Plaintiff to sue Defendants with which that Plaintiff did not transact any business.

C. APPLICABILITY OF RULE 23

Defendants assert that the First Amended Complaint should be dismissed because Plaintiffs have failed to plead the requirements of Rule 23, SCRCP, or, in the alternative, Plaintiffs must be required to plead and prove the requirements of Rule 23 during the liability or litigation phase of this case.

In my Order filed August 1, 2007, denying Defendants' motions to dismiss, I ruled that South Carolina Code Ann. § 56-15-110(2) (2006) creates a substantial or substantive right. I further found that Act No. 100 of 1985, 1985 S.C. Acts 277, which enacted the South Carolina Rules of Civil Procedure, did not apply to or affect substantive rights. The 1985 Act did not repeal Section 56-15-110(2). Therefore, Plaintiffs are not required to plead and prove the requirements pertaining to class actions contained in Rule 23, SCRCP.

I have considered Defendants' arguments to reconsider my ruling regarding Rule 23, SCRCP. I reaffirm my ruling as set forth in my Order filed August 1, 2007 and deny Defendants' motions to dismiss and to reconsider my earlier ruling on this ground. Plaintiffs are not required to plead and prove the requirements pertaining to class actions contained in Rule 23 SCRCP during the liability or litigation phase of this case.

D. IMPROPER JOINDER AND VENUE

Defendants contend that the First Amended Complaint should be dismissed against all Defendant dealerships on the ground of improper joinder pursuant to Rules 12(b)(6) and 20(a), SCRCP. Defendants assert that Plaintiffs should be required to refile their Complaints individually in the county of proper venue, i.e., where a given Defendant has its principal place of business. In my Order filed August 1, 2007, denying Defendants' motions to dismiss, I did not explicitly rule on Defendants' motions relating to improper joinder and venue.

I have considered the parties' arguments on this issue, including the arguments made in the various memoranda and hearings listed above. These motions in this case now pertain only to seven Plaintiffs and seven Defendants, given my decision to grant Plaintiffs' motion to voluntarily dismiss all no-sale Defendants in the First Amended Complaint. Accordingly, I will refrain from ruling on these issues until after discovery is completed. Defendants may refile or renew their motions related to dismiss for improper venue and improper joinder at that time.

E. CIVIL CONSPIRACY CLAIM

Defendants assert that Plaintiffs have failed to adequately plead their civil conspiracy claim and so this claim should be dismissed from the First Amended Complaint in its entirety. In my Order filed August 1, 2007, I rejected Defendants' arguments and ruled that Plaintiffs have pleaded a civil conspiracy claim sufficiently to survive a motion to dismiss under Rule 12(b)(6), SCRCP. I reaffirm that ruling, but clarify its extent with regard to Defendants with which the named Plaintiffs did not transact business.

As explained in Section III(B)(3) above, a named Plaintiff may not rely on the mere assertion of an adequately pleaded civil conspiracy claim to obtain standing against no-sale Defendants, i.e., Dealers with which a given Plaintiff did not transact any business. However, each named Plaintiff has standing to bring and has adequately pleaded in the First Amended Complaint a civil conspiracy claim against the Defendant from which that Plaintiff purchased a vehicle.

If Plaintiffs obtain sufficient evidence during the discovery process to create a genuine issue of material fact on the existence of a civil conspiracy among certain Defendants, then a named Plaintiff at that point would gain standing to sue, on behalf of himself or others, those particular Defendants which allegedly conspired on the charging of a closing fee with the Defendant from which the named Plaintiff purchased a vehicle. The named Plaintiff would not gain standing to sue every other Defendant in the state with which he or she did not transact any business, but only those allegedly involved in a conspiracy with the Defendant from which the Plaintiff did purchase a vehicle. If Plaintiffs do not obtain sufficient evidence of a civil conspiracy, dismissal of this claim pursuant to a summary judgment motion may be appropriate. Defendants may file summary judgment motions related to dismissal of the civil conspiracy claim after discovery is completed and before trial begins. I express no opinion on the validity of any civil conspiracy claim or whether dismissal of the claim ultimately may be appropriate.

F. ARBITRATION AND OTHER GROUNDS FOR DISMISSAL

Numerous Defendants have filed various motions related to arbitration agreements, including motions to dismiss the Complaint for lack of jurisdiction or to compel arbitration based on arbitration clauses found in buyer's orders or invoices and other documents related to the sale or financing of a vehicle. At the hearing on November 30, 2007, I heard arguments from Plaintiff Christine Watts and Defendant Sonic Automotive 2752 Laurens Rd., Greenville, Inc, d/b/a Century BMW, related to the arbitration agreement allegedly signed by Ms. Watts when she purchased a vehicle. I allowed those parties more time to conduct additional discovery, including depositions, pertaining solely to issues related to the arbitration agreement. No ruling has been issued on the arbitration motion in Ms. Watts' case.

No other arbitration motions from any parties have been heard by the Court. As I previously have stated or ruled at various hearings, no party has waived any substantive or procedural rights or arguments relating to arbitration agreements, including the right to move to compel arbitration. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). Defendants have been careful throughout this litigation to preserve all rights related to the enforcement of arbitration agreements, as acknowledged on several occasions by Plaintiffs and this Court.

Furthermore, certain Defendants have asserted numerous other arguments and grounds for dismissal in various motions to dismiss and other pleadings filed in response to the Complaint. These other issues have not yet been considered by the Court and are expressly reserved for later review and consideration.

G. DISCOVERY

Discovery has been stayed while the parties and the Court addressed the preliminary issues contained in this Order. Discovery may proceed in this case after the filing of this Order.

IT IS SO ORDERED.

/s/ Doyet A. Early, III
Doyet A. Early, III
Judge of the Second Judicial Circuit

January 31 2008

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

[Filed Oct 12, 2009]

Civil Action No. 06-CP-02-1230

HEATHER HERRON, NATALIE ARMSTRONG, MICHAEL RITZ, JULIE FREEMAN, CHRISTINE WATTS, MICHAEL BLEASE, MICHAEL WATTS, Individually and for the Benefit of All Car Buyers Whom Paid "Administrative Fees" as Described below to Defendants

Plaintiffs,

vs.

CENTURY BMW A/K/A SONIC AUTOMOTIVE; DICK DYER & ASSOCIATES, INC.; GALEANA CHRYSLER PLYMOUTH, INC. A/K/A GALEANA CHRYSLER JEEP, INC.; J.L.H. INVESTMENTS, LP A/K/A HENDRICKS HONDA; OVERLAND, INC. D/B/A LAND ROVER OF COLUMBIA; TAYLOR TOYOTA A/K/A TAYLOR INVESTMENTS; AND TOYOTA OF GREENVILLE, INC.

Defendants.

This matter comes before the Court by way of Plaintiffs' Motion to Dismiss and Substitute as to Defendant Toyota of Greenville. This motion was argued before me on October 1, 2009. After considering the parties' filings, as well the legal arguments of counsel, I have determined the motion should be granted and that David Carroll is to replace Plaintiff Michael Watts as the named

representative as to Defendant Toyota of Greenville, Inc. Plaintiff Watts's individual claims are dismissed with prejudice.

This a consumer protection action brought against the Defendants based on alleged violations of South Carolina laws, including but not limited to the South Carolina Manufacturers, Distributors, and Dealers Act ("Dealers Act"), codified at S.C. Code Ann. sections 56-1510, *et seq*. The Dealers Act prohibits motor vehicle dealers from engaging "in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public," S.C. Code Ann. § 56-15-40. in order to protect the public, through enforcement of the Dealers Act, the Legislature created a private right of action for damages in section 56-15-110, and in order to further protect the public through private enforcement, added a separate provision enabling a private action to be brought in a representative capacity for "the benefit of the whole" S.C. Code § 56-15-110(2). The specific language of this section reads:

> When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

Id. This statute allows one aggrieved car purchaser to sue "for the benefit of the whole," including all persons hurt by the same Defendant's violations of the Dealers Act.

This case was filed on August 29, 2006. On October 31, 2006, Plaintiffs amended the Complaint. The October 31, 2006 amendment added Plaintiff Michael

Watts as a named representative under the Dealers Act representing all persons who paid "administrative fees" to Defendant Toyota of Greenville, Inc. Plaintiffs' Amended Complaint defines "administrative fees" as including illegal fees often referred to as an 'administrative fee,' a 'recording and processing fee,' 'closing fee,' 'dealer documentation and closing fee.'" Plaintiffs allege that Defendants are charging the "administrative fees" in violation of the Consumer Protection Code, S.C. Code Ann. §37-2-307, and the Dealers Act, §56-15-10 *et seq*.[1]

In July 2007, this Court issued an Order confirming a substantive statutory right of the named Plaintiffs to proceed "for the benefit of the whole" under the Dealers Act against all Defendants without "a requirement that the plaintiff plead and prove the class certification requirements of S.C.R.P. Rule 23." This finding certifies that the named plaintiffs could proceed on behalf of the group of car purchasers who paid "administrative fees."

In January 2008, this Court ruled on certain Defendants' Rule 59(e) motions and then held that each named Plaintiff had standing to sue for himself and in a representative capacity for others against the Defendant that transacted business with that named Plaintiff. The January 2008 ruling confirmed that named Plaintiffs, including Plaintiff Watts, who, as alleged in the Amended Complaint, paid "administrative fees," represented a large group of people who had paid the same kind of fee.[2]

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[1] The Consumer Protection Code, S.C. Code Ann. § 37-2-307 uses the term "closing fees" as encompassing all of these fees.

[2] As stated by Plaintiffs' counsel at the hearing and confirmed by Defendant Toyota of Greenville's Second Revised Answers to

In May 2009, Plaintiff Watts decided that he no longer wished to participate in this case as the named representative plaintiff against Defendant Toyota of Greenville, Inc. Defendant Toyota of Greenville, Inc. refused to consent to Plaintiff Watts's request for a dismissal with prejudice of his claim.

In June 2009, David Carroll, a purchaser who like Plaintiff Watts alleges he paid "administrative fees" to Defendant Toyota of Greenville, Inc., came forward and sought to be substituted as a named representative in this case in order to protect the interests of the group of car purchasers that was represented by Plaintiff Watts. David Carroll has answered written discovery promulgated by Defendant Toyota of Greenville, Inc. and has provided available dates for his deposition.

On June 23, 2009, Plaintiffs' counsel filed this motion seeking to dismiss Plaintiff Michael Watts and substitute David Carroll in this action. In support of the motion, Plaintiffs argue that in representative actions the unnamed group members have an interest that should be protected by allowing the replacement of the named representative. Plaintiffs cite to representative cases for the proposition that "[W]hen a class representative is unable or unwilling to continue as the class representative, the court should permit class members an opportunity to substitute themselves as the class representative. By doing so, the court protects the interests of the class, which has a separate and distinct legal status from

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Plaintiffs' First Set of Interrogatories, this Court was correct that there are thousands of car purchases at issue. One purchaser who paid an "administrative fee" has the statutory right to proceed "for the benefit of the whole."

that of the representative." Citing *Birmingham Steel Corp. v. Tennessee Valley Authority*, 353 F.3d 1331 (11th Cir. 2003); *Swan v. Stoneman*, 635 F.2d 97 (2nd Cir. 1980); *Griffith v. Bowen*, 678 F.Supp. 942 (D.Mass. 1988).

Defendant Toyota of Greenville, Inc. opposes the motion. Toyota of Greenville, Inc. argues that replacement of Mr. Watts is not proper because class certification has not occurred. At the hearing, Toyota of Greenville, Inc. conceded that if class certification had occurred in this case, Toyota of Greenville, Inc. would not oppose the requested replacement of Plaintiff Watts with Mr. Carroll.

Toyota Greenville, Inc.'s argument as to the necessity of a class certification order fails. This is not a Rule 23, SCRCP class action. This is a group representative action under the Dealers Act, S.C. Code Ann. Section 56-15-110(2). Nothing under the Dealers Act requires the Plaintiffs to move for class certification. Furthermore, I previously ruled "that a named Plaintiff has standing to pursue all three causes of action, on behalf of himself or others, against the Defendant from which that particular Plaintiff purchased a vehicle. . . ." and that "[P]laintiffs are not required to plead and prove the requirements pertaining to class actions contained in Rule 23 SCRCP during the liability or litigation phase of this case." January 31, 2008, Order, pp. 5 and 11. This Order confirmed that the named Plaintiffs were prosecuting these cases in a representative capacity on behalf of the group of purchasers who purchased vehicles from the same dealership and paid "administrative fees." No separate class certification order is required under the Dealers Act, as "group representation" has already been granted to the named

Plaintiffs. Accordingly, Toyota of Greenville, Inc.'s argument that a class certification order is a prerequisite to allowing Mr. Carroll to replace Plaintiff Watts fails.[3]

Additionally, I find that the unnamed members of the group have an interest in the case that needs to be protected. *See Birmingham Steel Corp. v. Tennessee Valley Authority*, 353 F.3d 1331 (11th Cir. 2003); *Swan v. Stoneman*, 635 F.2d 97 (2nd Cir. 1980); *Griffith v. Bowen*, 678 F.Supp. 942 (D.Mass. 1988). As pointed out by several commentators, the interest of unnamed members in a representative suit is significant such that Plaintiffs' counsel has a duty when the unnamed members of the group stand to unknowingly lose their claims "to make reasonable efforts to recruit and identify a. new representative." The Annotated Manual for Complex Litigation provides in part:

> Later replacement of a class representative may become necessary if, for example the representative's individual claim has been mooted or otherwise significantly altered. Replacement also may be appropriate if a representative has engaged in conduct inconsistent with the interests of the class or is no longer pursuing the litigation. In such, circumstances, courts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets the Rule 23(a) requirements.

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[3] Notably, even in Rule 23 class actions, some courts have allowed the replacement of named plaintiffs prior to class certification. *See Griffith v. Bowen*, 678 F.Supp. 942 (D.C.Mass. 1988).

Annotated Manual for Complex Litigation, (Fourth), §21.26. Based on the foregoing, I find that the unnamed group members here who paid administrative fees to Defendant Toyota of Greenville, Inc. have an interest from the inception of the suit that needs to be protected by the replacement of Plaintiff Watts with David Carroll.

Furthermore, this case is being prosecuted pursuant to a "private attorneys general" provision under the Dealers Act. A "private attorneys general suit" is a term used by courts when statutes authorize both the Attorney General's office and private citizens, through civil actions, to enforce regulation. *See Hedgepath v, American Tel.& Tel. Co.*, 348 S.C. 340, 359, 559 S.E.2d 327, 338 (Ct.App. 2001) (discussing *Aurora National Bank v. Tri Star Marketing*, 990 F.Supp. 1020 (N.D.Ill.1998) and the "private attorneys general" provision in the Resource Conservation and Recovery Act). In this case, the Dealers Act empowers both the state Attorney General and private citizens to seek injunctive relief on behalf of the public. *See* §56-15-40(5) (empowering the Attorney General to issue injunctive relief) and §56-15-110(2)(empowering private citizens to bring suit for the benefit of the public interest). Plaintiffs have sought injunctive relief on behalf of the whole and thus are acting as private attorneys general. *Cf Davis v. U.S. Bancorp*, 383 F.3d 761 (8th Cir. 2004) (referring to Minn.Stat. §8.31, subd. 3a, as a private attorney general statute. Minn.Stat. §8.31, subd. 3a, like the Dealers Act allows individuals to enforce statutes regulating unfair business practices by bringing a civil cause of action). Plaintiffs' counsel, as private attorneys general, from the inception of this litigation have represented the public interest in attempting to regulate allegedly unfair practices by

motor vehicle dealers and therefore represent all those affected by such practices. Class certification is not a prerequisite to action to a private attorneys general suit. Moreover, the public interest is protected by allowing the replacement of Plaintiff Watts by David Carroll. Because I find this case is being prosecuted as private attorneys general, this is an additional reason why Plaintiffs' motion should be granted.

Toyota of Greenville, Inc. also argues that Mr. Carroll should not be permitted to replace Plaintiff Watts in this case because there is no rule of civil procedure specifically dealing with this situation. Plaintiffs' counsel contends that Rule 7, SCRCP allows parties to apply for Orders from the Court when the rules do not provide specifically for a motion. *Citing* Wright & Miller, Federal Practice and Procedure, § 1190 ("Finally, a party confronted by a situation in which the rules do not provide specifically for a motion, but who can show a need for an order from the court to prevent overreaching or injustice, may make what might be called an 'undifferentiated motion' stating his problem, the grounds for relief, and the remedy desired."). Plaintiffs also point out that replacing named representatives is permitted in other representative lawsuits even though it does not fall within the technical meaning of the terms "substitution' or "intervention" as used in the rules of civil procedure. *Citing Coffey v. Braddy*, 2009 WL 591280, n. 7 (M.D.Fla. 2009) ("[N]othing more is required than to permit the original representatives, who apparently have relinquished their duties, to be replaced. Although some of the cases reviewed use the terms 'intervention' and 'substitution,' it appears many courts use both those terms (sometimes interchangeably within the

same sentence) to describe the replacement of class representatives, not necessarily meaning to ascribe to the terms the technical meaning under the Federal Rules of Civil Procedure."). Notably, again, at the hearing, Toyota of Greenville, Inc. conceded that if class certification had occurred in this case, Toyota of Greenville, Inc. would not oppose the requested replacement of Plaintiff Watts with Mr. Carroll.

I find Plaintiffs' arguments as to Rule 7, SCRCP and the *Coffey* case persuasive. This interpretation is in accord with Rule 1, SCRCP which states that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." In this case, if I were to deny the motion, Mr. Carroll may be forced to start over and file a separate lawsuit on behalf of the group already represented in this action. This separate case would be the fourth case dealing with the same issues before the Court in this matter.[4] The filing of a new lawsuit to replace this existing case is not speedy or inexpensive. Additionally, I find that the replacement of Plaintiff Watts with David Carroll avoids unfair prejudice to all parties and is therefore just. The substitution allows all parties to proceed towards a final determination on the merits after several years of litigation without starting anew. It would be unfair to all to sacrifice the time and expense of this litigation without the certainty of final ruling on the legality of the actions at issue.

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[4] In addition to this case the cases of *Adams, et al v. Action Ford, et al*, Civil Action Number: 07-CP-02-1232 and *West-Cox., et al v. Cale Yarborough Honda, Inc., a/k/a Cale Yarborough Motors of SC, et al.* Civil Action No.: 2007-CP-1154 also involve allegations of illegal "administrative fees."

I also find that an award of attorneys fees to Toyota of Greenville, Inc. is not warranted. None of the cases cited by Toyota of Greenville, Inc. are representative actions where absent group members needed to be protected. *See Shipp v. Richardson Corporation of South Carolina, Inc.*, 285 S.C. 460, 330 S.E.2d 291 (1985); *Mauro v. Clabaugh*, 299 S.C. 184, 383 S.E.2d 244 (Ct.App. 1989); *McEachern v. Wilson*, 165 S.C. 485, 164 S.E.2d 133 (1932). This is a representative action under the Dealers Act and any prejudice to Toyota of Greenville, Inc. is mitigated by the substitution of Mr. Carroll. Mr. Carroll will replace Plaintiff Watts, as the named representative for the group of Toyota of Greenville, Inc. purchasers currently represented in this proceeding. This group will continue to be in the suit and any effort expounded by Toyota of Greenville, Inc. in defending against the group's claims will not be lost. Additionally, the cases cited by Toyota of Greenville, Inc. all involve dismissals *without* prejudice. By contrast, Plaintiff Watts seeks to dismiss his personal claims *with* prejudice. Toyota of Greenville, Inc. would not automatically be entitled to attorneys fees if Plaintiff Watts's individual claim was lost with prejudice on summary judgment or at trial. Accordingly, it would be inequitable to force Mr. Watts to pay attorneys fees for dismissing only his individual claim with prejudice at this stage.

Based on the foregoing and after full consideration of the issues herein,

IT IS HEREBY ORDERED that the Motion to Dismiss Plaintiff Michael Watts and substitute David Carroll by and the same is hereby granted,

IT IS FURTHER ORDERED that the Defendant's Request for Attorneys fees be and the same is hereby denied.

AND IT IS SO ORDERED.

/s/ Doyet A. Early, III
Doyet A. Early, III
Resident Circuit Court Judge
Second Judicial Circuit

Bamberg, South Carolina
This 7th day of Oct., 2009

FORM 4

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	JUDGMENT IN A CIVIL CASE
IN THE COURT OF COMMON PLEAS	Case No. 2006CP0201230
Heather Herron, et al	CarMax Auto Superstores Inc.
PLAINTIFF(S)	DEFENDANT(S)

CHECK ONE:

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ ACTION DISMISSED (*CHECK REASON)*: ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ ACTION STRICKEN (*CHECK REASON)*: ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

IS ORDERED AND ADJUDGED:

☑ See attached order. (Formal order to follow)

☐ Statement of Judgment by the Court:

This judgment/order was entered on the 12th day of October, 2009, and a copy mailed this 12th day of October, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

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/s/ Liz Godard by A. Knopfell
CLERK OF COURT

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

[Filed January 11, 2010]

Case No. 2006-CP-02-1230

HEATHER HERRON, *et al.*,
Plaintiffs,

v.

DICK DYER & ASSOCIATES, INC. *et al.*,
Defendants.

THIS is before me on the motion of all Plaintiffs for Declaratory Judgment asking the Court to issue a declaratory judgment against all Defendants interpreting S.C. Code Ann. § 37-2-307 (the "Closing Fee Statute" or "Statute"), and declaring that various actions or practices constitute violations of the Closing Fee Statute, and section 56-15-30(a) of the Regulation of Manufacturers, Distributors and Dealers Act, S.C. Code § 56-15-10, *et seq*. ("Dealers Act"). A hearing was held on Plaintiffs' Motion before this Court on November 23, 2009.

Defendants objected to proceeding forward with the Plaintiffs' Motion for various reasons including improper joinder and improper venue. A ruling on these issues has previously been reserved until after the completion of discovery. There is no dispute that venue is proper as to Defendant Taylor Toyota, and therefore, with the agreement of the Plaintiffs, the Court proceeded with hearing the motion of Plaintiff Michael Ritz against Defendant Taylor Toyota

("Plaintiff's Motion"). Although Plaintiffs Motion requests that the Court issue a number of declarations regarding the meaning of various sections of the Closing Fee Statute and whether particular actions by Defendants violated the Closing Fee Statute and the Dealers' Act, at the hearing, Plaintiff narrowed the scope of his request and asked the Court only to interpret two terms used in the Closing Fee Statute, namely the terms "closing fee" and "advertised price."

Defendants objected to Plaintiffs request, arguing that despite the title of his motion, Plaintiff was really asking for the Court to issue an advisory opinion. Specifically, Defendant argued that a determination of the definitions of "closing fee" and "advertised price" would not settle the legal rights of any party involved, and thus the ruling would only be advisory in nature. Counsel for Defendant Taylor Toyota also objected on the grounds that these more narrow issues had not yet been fully briefed and were not yet ripe for argument.

The South Carolina Declaratory Judgments Act states that "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20. I find that the Plaintiff's request that I define the terms "closing fee" and "advertised price" constitutes a request for a declaration for the purposes of the Declaratory Judgments Act and that these issues are ripe for determination by the Court and issue this opinion accordingly.

On June 7, 2003, Plaintiff Ritz purchased a 2003 Toyota Tacoma Truck from Defendant Taylor Toyota. Mr. Ritz's invoice provides in part:

Model No 7188 Stock No. [Illegible]	
1. Vehicle Price	22818.33
2. Procurement/Delivery Fee	277.00
3. Secure Etch	N/A
4. Total Selling Price	23095.33
5. Gross Vehicle Allowance	N/A
6. Trading Difference	23095.33
7. State & Local Sales Taxes	1616.97
8. License Tag & Title Fee	23.00
9. Subtotal	24735.00
10. Payoff on Trade-In	N/A
11. Total	24735.00
12. Partial Payment	N/A
13. Subtotal	24735.00
14. Service Contract	N/A
15. Cash On Delivery	3750.00
16. Balance/Amt. Financed	20985.00

It is undisputed that the $277.00 "PROCUREMENT/ DELIVERY FEE"[1] shown above is a closing fee as referenced in S.C. Code Ann. §37-2-307.[2] Mr. Ritz paid the $277.00 PROCUREMENT/ DELIVERY FEE to Taylor Toyota.

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[1] On the registration form filed with the State Department of Consumer Affairs (hereinafter "the Department of Consumer Affairs") and signed by Taylor Toyota; the form showed the Closing Fees to be charged "will not exceed $400." See Exhibit 1 to the Rule 30(b)(6) deposition of Taylor Toyota, bates 4669. Taylor Toyota asserts the form covers the "PROCUREMENT/ DELIVERY FEE" of $277.00

[2] In the Rule 30(b)(6) deposition of Taylor Toyota, the parties used the terms administrative fees and closing fees interchangeably to describe the $277 PROCUREMENT/DELIVERY FEE charged to Mr. Ritz. *See eg.* p. 6, ll. 24-25 and p. 39, ll. 4-21.

On October 31, 2006, Plaintiff Ritz filed an Amended Complaint in this matter. In the Amended Complaint, Plaintiff Ritz alleges that the $277 PROCUMENT/DELIVERY FEE charged by Defendant Taylor Toyota violated S.C. Code Ann. §37-2-307 and the Motor Vehicle Dealers Act, S.C. Code Ann. §56-15-10 *et. seq*. ("Dealers Act"). Plaintiff Ritz alleges that Defendant Taylor Toyota failed to include the closing fee in the advertised price of his car and that Defendant Taylor Toyota impermissibly charged a closing fee for an improper purpose (for profit and not for reimbursement of closing costs). Plaintiff Ritz alleged a cause of action for violation of the Dealers Act and a cause of action requesting a Declaratory Judgment interpreting S.C. Code Ann. §37-2-307 and the Dealers Act.

Defendant Taylor Toyota denies that it violated S.C. Code Ann. §37-2-307 or the Dealers Act. Defendant Taylor Toyota maintains that Plaintiff Ritz's vehicle did not include an "advertised price" as defined in S.C. Code Ann. §37-2-307 and that the closing fee charged was for a permissible purpose.

On May 28, 2009, Plaintiff Ritz filed a Motion requesting the Court issue the Declaratory Judgment. As stated by Plaintiffs counsel at the hearing, Plaintiff Ritz simply seeks an interpretation of the words "closing fee" and "advertised price" as the words appear in S.C. Code Ann. §37-2-307.

The Closing Fee Statute was enacted in 2000, and made a part of the South Carolina Consumer Protection Code, S.C. Code § 37-1-101, *et seq*. ("SCCPC"). The Closing Fee Statute, in its entirety, states as follows:

> Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be *included in the advertised price* of the motor vehicle, *disclosed on* the sales contract, and *displayed in* a conspicuous location in the motor vehicle dealership.

Id. § 37-2-307 (emphasis added).

The Closing Fee Statute authorizes motor vehicle dealers to register the amount of the fee with the Department of Consumer Affairs (hereinafter the "Department") and charge closing fees to consumers. The Statute imposes three other requirements on dealers charging closing fees:

(1) the fee must be *disclosed to* the consumer on the sales contract or invoice;

(2) some notice of the fee must be *displayed in* a conspicuous place in the dealership; and

(3) the fee must be *included in* the advertised price of the motor vehicle.

The Closing Fee Statute does not further define the terms "closing fee" or "advertised price."

The Department is charged with the administration of the Closing Fee Statute, and the Department also monitors and enforces certain advertising guidelines with respect to motor vehicle dealers and other creditors. As such, in interpreting the Closing Fee Statute, it is appropriate for the Court to review and give deference to any interpretations of the Statute by the Department. *See Faile v. S.C. Employment Sec. Comm'n*, 267 S.C. 536, 540, 230 S.E.2d 219, 221-22 (1976) ("The construction of a statute by the

agency charged with executing it is entitled to the most respectful consideration and should not be overruled without cogent reasons."); *Lexington Law Firm v. Dep't of Consumer Affairs*, 2009 S.C. LEXIS 133 (S.C. May 12, 2009) ("The Court should defer to the [Department of Consumer Affairs'] findings where there is no compelling reason to reject it."). Because the Department is charged by the Legislature with regulating closing fees and dealers' compliance with the Closing Fee Statute, it is in the best position to interpret the Statute's meaning. In fact, the SCCPC provides that if an entity regulated under the SCCPC (including motor vehicle dealers) acts in "conformity with any written order, opinion, interpretation or statement" of the Department, then that entity shall be free from penalty. S.C. Code Ann. § 37-6-506(3).

The Department has issued an interpretation of the Closing Fee Statute in Administrative Interpretation 2.307.0101, dated June 7, 2001 (the "Administrative Interpretation" or "Interpretation"). This is the only written interpretation of the Closing Fee Statute by the Department. (Deposition of Danny Collins ("Collins Depo.") p. 25, ll. 19-24.) The Administrative Interpretation explains the procedure for complying with the Closing Fee Statute, and explains how dealers can comply with the registration and disclosure requirements. The Interpretation states, in pertinent part, as follows:

> As clearly indicated from the terminology of Section 37-2-307, from the effective date of that section (June 30, 2000), any dealer choosing to assess a closing or documentation fee must: 1.) File a registration fee of ten dollars ($10.00) with the Department each state fiscal year prior to the assessment of a closing fee; 2.) Disclose the

> closing fee on its sales contract; 3.) Display in a conspicuous place in the dealership a statement that indicates the closing fee may be charged; and 4.) If the closing fee is charged, and the vehicle is advertised, the closing fee must be included in the advertised price so that consumers cannot be unfairly surprised by having the closing fee added on after the acceptance of an advertisement's terms. In the absence of any of these requirements, the charging of a closing or other similar fee is an excess charge for Consumer Protection Code purposes.

In discussing the Statute's requirement that dealers pay a registration fee to the Department and display a notice in the dealership that the dealer charges a closing fee to consumers, the Interpretation states further:

> While the [Statute] does not directly say so, the registration fee is referred to as a registration fee and not merely as a fee, with the apparent implication that the dealership seeking to charge closing fees should likewise file or register the disclosure it seeks to use. The attached disclosure may be used for this purpose. It is not required that the dealers use the attached form, but if they do, they will be deemed compliant if the form is properly filled out. Forms considered to be deceptive or to misstate the law will be rejected by the Department.

(Interpretation at p. 2.)

The Interpretation also states that "[t]he [Statute] does not specify the content of the disclosure other than to indicate that it must be displayed in a conspicuous place." (*Id.* at p. 3.)

The "attached disclosure" referenced in the Interpretation is a form issued by the Department and titled "Notice—Closing Fees" ("Registration Form") that all dealers involved in this action used throughout the relevant time period to register their fees with the Department and display at their dealership. The Registration Form states, in pertinent part:

> This Dealership charges closing fees as a means of reimbursing it for certain overhead costs such as document retrieval and document preparation. It is a charge that is permitted but not required by law. The full cash price charged at any dealership depends on many factors, including all products and services bought with the vehicle.

(*Id.* at p. 4.)

The Registration Form was changed by the Department in the spring of 2008, prior to the registration renewal period of July 1st of that year,[3] and now states as follows:

> This dealership charges closing fees on a motor vehicle sales contract. It is a charge that is permitted but not required by law (Section 37-2-307). The full cash price charged at any dealership depends on many factors, including all products and services bought with the vehicle.

(http://www.scconsumer.gov/licensing/mv_closing_fee.htm.)

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[3] In his deposition, Mr. Collins testified that wording change in the Registration Form did not change the Department's interpretation of the closing statute in any manner. (Collins Depo. p. 21, ll. 15-21; p. 91, ll. 16-21.)

Other than as previously discussed herein, the Interpretation does not further define the terms "closing fee" or "advertised price."

Danny Collins, the Deputy for Regulatory Enforcement of the Department, testified that the 2001 Interpretation is the Department's official position as to the Closing Fee Statute and as long as a dealer has complied with the Interpretation, a dealer would not be found by the Department to be in violation of the Closing Fee Statute. As a part of its regular enforcement activities, the Department regularly reviews and stamps approval of automobile dealers' closing fee registration forms. (Collins Depo. pp. 37-38, p. 94, ll. 3-5.) The Department also enforces advertising guidelines relating to advertising by automobile dealers. (*Id.* at p. 10, ll. 14-20.)

Section 37-1-102, which sets forth the purposes of the South Carolina Consumer Protection Code, declares that it shall be liberally construed and applied to promote its underlying purposes and policies. S.C. Code Ann. § 37-1-102(1). One of the primary purposes of the Consumer Protection Code is to "protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors." *Id.* § 37-1-102(2)(d).

Plaintiff has asked the Court to determine the meaning of two terms as used in S.C. Code Ann. §37-2-307: "closing fee" and "advertised price."

When interpreting a statute, the court's primary function is to ascertain the intention of the Legislature. *Plowman v. Bagnal*, 316 S.C. 283, 285, 450 S.E.2d 36, 37 (1994). A statutory provision should be

given a reasonable construction consistent with the purpose and policy expressed in the statute. *Jackson v. Charleston County Sch. Dist*, 316 S.C. 177, 181, 447 S.E.2d 859, 861 (1994). Where, as here, a court is confronted with an undefined term in a statute, the term must be interpreted in accordance with its usual and customary meaning. *Branch v. City of Myrtle Beach*, 340 S.C. 405, 410, 532 S.E.2d 289, 292 (2000). Words must also be construed without resorting to subtle or forced constructions which limit or expand the statute's operation. *SCANA v. S.C. Dept. of Revenue*, 384 S.C. 388, 392, 683 S.E.2d 468, 470 (2009). Finally, terms must be construed in context. *S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991).

The first term at issue is "closing fee" as used in S.C. Code Ann. §37-2-307. This term appears twice in the statute, which provides:

> Every motor vehicle dealer charging *closing fees* on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The *closing fee* must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

(Emphasis added).

Plaintiff Ritz contends that a "closing fee" is a predetermined set fee for the reimbursement of closing costs such as document retrieval and document preparation. Defendant Taylor Toyota contends that there is no "limit to the purposes for which closing

fees can be charged."[4] Taylor Toyota further argues that a "closing fee" does not have to be for reimbursement or related in any way to an automobile closing and may include dealer profit.

This statute authorizes a motor vehicle dealer to charge "closing fees." Use of the word "closing" must be given some meaning. *See Hartford Acc. and Indem. Co. v. Lindsay*, 273 S.C. 79, 85, 254 S.E.2d 301, 304 (1979) (full effect must be given to each portion of a statute, and a court should avoid interpretation that renders a portion meaningless).

I first look to the plain and ordinary meaning of the word "closing" in relation to the sale of a motor vehicle. Black's Law Dictionary defines "closing" as "the final meeting between the parties to a transaction, at which the transaction is consummated . . ." Black's Law Dictionary (8th ed. 2004). Closing occurs at the time the purchaser fills out the motor vehicle sales contract and other paperwork necessary to complete a purchase. Accordingly, I find that a "closing fee" as used in S.C. Code Ann. §37-2-307 starts with a fee associated with an automobile closing. I reject Taylor Toyota's assertion that a "closing fee" does not have to be related to an automobile closing. This interpretation would render the word "closing" meaningless.

Defendant Taylor Toyota's contention that there is no "limit to the purposes for which closing fees can be

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[4] Defendant Taylor Toyota's Memorandum in Opposition to Motion for Declaratory Judgment, page 14, states "the Closing Fee Statute does not limit the purposes for which closing fees can be charged."

charged"[5] is unreasonable in light of the purpose of the statute. "A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers." *Greenville Baseball v. Bearden*, 20 S.E.2d 813, 815-816 (1942). When S.C. Code Ann. §37-2-307 was enacted, it was included in the Consumer Protection Code. This indicates that S.C. Code Ann. §37-2-307 was enacted to protect consumers. Accordingly, I find that the statute should be construed to protect consumers.

Defendant Taylor Toyota's proposed interpretation that the fee is not limited and can be charged for any purpose does not protect consumers. Under Defendant Taylor Toyota's interpretation, dealers can charge a fee, call it a "closing fee" (document fee, processing fee or some other name associated with documentation for an automobile closing), and then use the fee solely to make a profit. This interpretation would authorize the dealers to charge a fee with a potentially misleading name. This interpretation does not protect consumers. I find this interpretation unreasonable in light of the statute's purpose of protecting consumers.

The more reasonable interpretation is that S.C. Code Ann. §37-2-307 authorizes the charging of "closing fees" which are for the reimbursement of set overhead costs arising from automobile closings such as document retrieval and document preparation. This interpretation protects consumers because it mandates that the charge is for the actual cost associated with a closing, which can he predetermined,

---

[5] *See* Defendant Taylor Toyota's Memorandum in Opposition to Motion for Declaratory Judgment.

and does not allow a dealer to name a fee a "closing fee" and then use the fee to make a hidden profit.

Accordingly, I hereby find that a "closing fee" is a pre-determined set fee for the reimbursement of closing costs, such as document retrieval and document preparation.

The "closing fee" is not limited to document retrieval and document preparation; it may include other closing fees actually incurred from the consummation of the transaction. It cannot be arbitrarily set, unlimited or include dealer profit. The dealer may only charge the buyer closing fees that are actually incurred and are a necessity to the closing, thus reimbursing the dealer for actual closing fees incurred.

The second term at issue is "advertised price." The Fee Disclosure Statute provides, in its entirety, that:

> [e]very motor vehicle dealer charging closing fees on a motor vehicle contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

S.C. Code Ann. § 37-2-307 (1976). The statute contains no definition of the term "advertised price." The court must therefore construe the statute to arrive at the appropriate definition. Canons of statutory construction previously cited will be applied again.

The statute expressly requires every motor vehicle dealer charging closing fees to include the fee in the advertised price of the motor vehicle. S.C. Code Ann.

§ 37-2-307 (1976). This language indicates that: (1) the statute applies to motor vehicle dealers and (2) an advertisement of the price of a motor vehicle by a dealer must include the closing fee. It is therefore inferable that an advertised price is a price contained in an advertisement of a motor vehicle by a motor vehicle dealer.

The terms "advertise" and "advertising" have been variously defined. The American Heritage Dictionary defines advertising as "[t]he activity of attracting public attention to a product or business, as by paid announcements in the print, broadcast or electronic media." American Heritage Dictionary of the English Language (4th ed. 2000). Webster's Third New International Dictionary (2002) defines "advertising" as "the action of calling something (as a commodity for sale, a service offered or desired) to the attention of the public esp. by means of printed or broadcast paid announcements." *Id.* at 31. The Compact Oxford English Dictionary states that "advertise" means "[t]o present or describe (a product, service, or event) in a public medium so as to promote sales." Compact Oxford English Dictionary (2005). Plaintiff Michael Ritz urges that the Court adopt the definition found in Black's Law Dictionary:

> [t]o advise, announce, appraise, command, give notice of, inform, make known, publish. To call a matter to the attention of the public by any means whatsoever. Any oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business and includes, without limitation . . . statements and representations made in a newspaper or on the radio or television or contained in any handbill, sign, catalog, or letter, or presented on or

> contained in any tag or label attached to or accompanying any merchandise.

Black's Law Dictionary (6th ed. 1990).

Taken together, these definitions indicate that the plain and ordinary meaning of the term "advertising" and/or "advertisement" is: (1) a notice given by the seller of a product or service; (2) to the general public for the purpose of attracting customers; (3) by means of printed announcements in handbills, signs, catalogs, or letters or announcements paid by or on behalf of the seller in newspapers, radio, television, or electronic media. This definition is also supported by the construction given the statute by the Department of Consumer Affairs. Danny Collins, the Department's Deputy for Regulatory Enforcement, testified that an advertisement is a display "to the public to try to attract attention." (Collins Dep. at 6:23 to 7:1 and 123:3-7).

Applying the above definition, the Court specifically excludes "Monroney" labels because they are statements made by the manufacturer and not the dealer.

The Court also concludes that it is improper to consider a negotiated price to be an advertised price. Statements about price made in the course of negotiations do not conform to the Court's findings of the meaning of the words "advertised price." They are made to an individual, rather than to the public.

Based on the foregoing and after full consideration of the issues herein, I hereby declare that:

1) A "closing fee" is a pre-determined set fee for the reimbursement of closing costs, such as document retrieval and document preparation, but only those

actually incurred by the dealer and necessary to the closing transaction.

2) An "advertised price" is a notice given by the seller of a product or service to the general public for the purpose of attracting customers by means of printed announcements in handbills, signs, catalogs, or letters or announcements paid by or on behalf of the seller in newspapers, radio, television, or electronic media.

AND IT IS SO ORDERED.

/s/ Doyet A. Early, III
The Honorable Doyet A. Early, III
Chief Administrative Judge
Second Judicial Circuit

January 11, 2010
Aiken, South Carolina

FORM 4

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	JUDGMENT IN A CIVIL CASE
IN THE COURT OF COMMON PLEAS	Case No. 2006CP0201230
Heather Herron Natalie Armstrong Alison Dannert Michael Ritz Julie Freeman	CarMax Auto Superstore Action Ford-Mercury In Addy Dodge, Inc. Addy's Harbor Dodge Altman Lincoln-Mercury
PLAINTIFF(S)	DEFENDANT(S)

CHECK ONE:

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ ACTION DISMISSED (*CHECK REASON)*: ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ ACTION STRICKEN (*CHECK REASON)*: ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

IS ORDERED AND ADJUDGED:

☑ See attached order.
☐ Statement of Judgment by the Court:

Dated at Aiken, South Carolina, this 11th day of January, 2010.

Court Reporter:

Presiding Judge:

This judgment was entered on the 11th day of January, 2010, and a copy mailed first class this 11th day of January, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

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/s/ Liz Godard by [Illegible]
CLERK OF COURT

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Civil Action No. 7:09-1651-HMH

EDWARD F. MARACICH, MARTHA L. WEEKS, AND JOHN C. TANNER, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

MICHAEL EUGENE SPEARS, MICHAEL SPEARS, P.A., GEDNEY M. HOWE, GEDNEY M. HOWE, III, P.A., RICHARD A. HARPOOTLIAN, RICHARD A. HARPOOTLIAN, P.A., A. CAMDEN LEWIS, AND LEWIS & BABOCK, LLP,
Defendants.

SUPPLEMENTAL DECLARATION OF JOHN. C. TANNER

John C. Tanner states and declares as follows:

1. I am a citizen and resident of the State of South Carolina and am over the age of 21. I have personal knowledge of the facts stated in this Declaration.

2. In the late summer of 2006, while I was a citizen and resident of Lugoff, South Carolina, I purchased a vehicle from McElveen Pontiac Buick GMC Hummer, a dealership located in Summerville, South Carolina

3. In the spring of 2007, I received a letter from the Defendants in this case. I sent the letter to Doug

McElveen, the dealer from whom I purchased my car, and it was never returned. However, the letter I received was the same in substance as the letter attached as Exhibit 1 to this Declaration.

4. When I received this letter from the Defendants, I called the office of Defendant Harpootlian at the number listed for his law office on the letter to find out how the Defendants had obtained my name and address and how they had learned about my recent car purchase.

5. The person who answered the phone confirmed that I had reached Mr. Harpootlian's law office. I was transferred to a person who identified himself as the attorney Richard Harpootlian. I told Mr. Harpootlian that I had received the letter described in paragraph 3 above.

6. Mr. Harpootlian did not express any interest in finding out any facts about my interaction with the dealership who sold me my car. Instead, he made an aggressive sales pitch to me in which he tried to get me to sign up as a client for a lawsuit against the dealership from which I had purchased my car. Mr. Harpootlian told me that if I agreed to be his client, he would get me two to three times what I had paid in fees to the dealership when I purchased my car. I declined Mr. Harpootlian's offer of representation.

7. In the course of our conversation, I asked Mr. Harpootlian how the Defendants had gotten my name and address, and Mr. Harpootlian informed me that he had obtained it from the SCDMV.

8. Neither Mr. Harpootlian nor anyone else at his office sought any information from me or suggested that they needed or were interested in me as a

possible witness. They expressed interest only in signing me up as a client.

9. I have never given my consent to the State of South Carolina Department of Motor Vehicles to release my Personal Information for the purpose of surveys, marketing or solicitation.

10. I have not made any attempts to recover the fees paid in connection with my vehicle purchase, nor have I contacted Doug McElveen or his dealership to make any complaints with respect to any such fees.

Pursuant to 27 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 9 day of June, 2010.

/s/ John C. Tanner
John C. Tanner

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ADVERTISING MATERIAL

May 8, 2007

Dear Sir/Madam:

We represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee". We believe that these fees are being charged in violation of South Carolina law.

We understand that you may have been charged one of these fees on your recent purchase of an automobile. *We obtained this information in response to a Freedom of Information Act request to the South Carolina Department of Motor Vehicles.*

The exact nature of your legal situation will depend on facts not known to us at this time. You should understand that the advice and information in this communication is general and that your own

situation may vary. However, we would like the opportunity [sic] discuss your rights and options with you in a free consultation. If you are interested in participating in the case or in a free consultation, please mail the enclosed postage paid card and we will contact you soon.

You may wish to consult your lawyer or another lawyer instead of us. You may obtain information about other lawyers by consulting the Yellow Pages or by calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer.

Sincerely,

/s/ Richard A. Harpootlian
Richard A. Harpootlian

ANY COMPLAINTS ABOUT THIS LETTER OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO COMMISSION ON LAWYER CONDUCT, POST OFFICE BOX 11330, COLUMBIA, SOUTH CAROLINA, 29211 - TELEPHONE NUMBER 803-734-2038

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
NOV 9 - 2012
OFFICE OF THE CLERK

No. 12-25

IN THE

Supreme Court of the United States

EDWARD F. MARACICH, *et al.*,
Petitioners,

v.

MICHAEL EUGENE SPEARS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' OPENING BRIEF

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November 9, 2012

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QUESTIONS PRESENTED

The Driver's Privacy Protection Act of 1994 (DPPA or Act), 18 U.S.C. §§ 2721–2725, prohibits the acquisition, use, or disclosure of "personal information" maintained in state motor vehicle department (DMV) databases, unless the use of such information falls within one of several discrete enumerated exceptions. This case presents an opportunity for this Court to resolve a conflict among the circuits and even state courts as to the circumstances under which the litigation exception to the Act permits lawyers special rights of access to DPPA-protected information.

In this case, the Fourth Circuit became the first court to hold that the acquisition and use by lawyers of confidential information from a DPPA-protected database solely for the purpose of soliciting clients, as opposed to searching for evidence or witnesses, qualified as a use "in connection with" litigation, pursuant to 18 U.S.C. § 2721(b)(4). The Eleventh Circuit, the Third Circuit, and the District of Columbia Court of Appeals, on the other hand, have held that the litigation exception does not permit lawyers to obtain or use DPPA-protected information to find or solicit clients. Instead, these courts have made clear that the litigation exception permits use of private information only when the information is relevant or likely to lead to discovery of evidence or witnesses. The Fourth Circuit has crossed that line, thereby inserting into the DPPA what amounts to a "for use by lawyers" exception, as opposed to a "for use in litigation" exception, and further muddling an already confusing and conflicted area of the law.

This petition asks the Court to consider two questions:

1. Whether the Fourth Circuit erred in holding, contrary to every other court heretofore to have considered the issue, that lawyers who obtain, disclose, or use personal information solely to find clients to represent in an incipient lawsuit—as opposed to evidence for use in existing or potential litigation—may seek solace under the litigation exception of the Act.

2. Whether the Fourth Circuit erred in reaching the conclusion (in conflict with prior precedent) that a lawyer who files an action that effectively amounts to a "place holder" lawsuit may thereafter use DPPA-protected personal information to solicit plaintiffs for that action through a direct mail advertising campaign on the grounds that such use is "inextricably intertwined" with "use in litigation."

PARTIES TO THE PROCEEDING

Petitioners include Edward F. Maracich, individually and on behalf of all others similarly situated, Martha L. Weeks, individually and on behalf of all others similarly situated, and John C. Tanner, individually and on behalf of all others similarly situated. Petitioners were plaintiffs in the district court and appellants in the court of appeals.

Respondents include Michael Eugene Spears; Michael Spears, PA; Gedney Main Howe, III; Gedney Main Howe III, PA; Richard A. Harpootlian; Richard A. Harpootlian, PA; A. Camden Lewis; and Lewis & Babcock, LLP. Respondents were defendants in the district court and appellees in the court of appeals.

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OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Fourth Circuit is reported at 675 F.3d 281 and reprinted in the Petition Appendix (Pet. App.) at 1a–44a. The decision of the district court is unreported and is reprinted at Pet. App. 47a–84a.

JURISDICTION

The Fourth Circuit issued its decision and judgment on April 4, 2012. Pet. App. 1a, 45a. On July 2, 2012, petitioners filed a timely petition for a writ of certiorari, which this Court granted on September 25, 2012. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of the Driver's Privacy Protection Act of 1994 (DPPA or Act), 18 U.S.C. §§ 2721–2725. The Act is reproduced in full in the addendum to this brief.

STATEMENT OF THE CASE

A. Introduction

The DPPA "regulates the disclosure of personal information contained in the records of state motor vehicle departments (DMVs)." *Reno* v. *Condon*, 528 U.S. 141, 143 (2000). The Act's fundamental purpose is to protect the privacy of the millions of individuals who must disclose personal information to state DMVs in order to obtain driver's licenses and to register vehicles. The DPPA achieves this purpose by flatly barring state DMVs from disclosing drivers' personal information unless the particular disclosure is authorized by one of the Act's exceptions.

One such exception permits disclosure and use of DPPA-protected information for "bulk ... solicitations," but only if the person to whom such personal information pertains has expressly consented. In this case, respondents obtained tens of thousands of names and addresses from a state DMV and used this protected information to engage in mass solicitation of individuals who (like petitioners and the class they seek to represent) never consented to such use. The Fourth Circuit nevertheless ruled that this use of DPPA-protected information for mass advertising was permissible. According to the lower court, a different provision of the DPPA exempts one group of commercial actors alone—lawyers—from the express-consent requirement of the solicitation exception.

The DPPA's "litigation exception," however, creates no such anomalous loophole. The solicitation exception reflects Congress's specific response to the targeted problem of people and companies obtaining personal information from state DMVs and using it to engage in mass advertising. The litigation exception, by contrast, does not mention solicitation, much less bulk solicitation. Accordingly, the solicitation exception is more specific than, and takes precedence over, any expansive reading of the litigation exception that would permit lawyer mass solicitation. Moreover, when read in its entirety, and in light of its placement and function in the overall structure of the DPPA, it is clear that the litigation exception permits disclosure of information only to ensure the integrity of judicial and agency proceedings. It is not designed to promote the commercial interests of lawyers. The Fourth Circuit's additional theory—that mass solicitation of potential clients is permissible if it is "inextricably intertwined" with otherwise permissible non-

solicitation conduct—has no basis in the text of the statute, and is in all events factually unfounded.

Enforcing the DPPA in accordance with its terms will not impair class actions. For many class action lawyers—such as those pursuing medical device tort actions or employment discrimination suits—DMV databases provide no means of identifying and soliciting potential clients. The DPPA simply requires lawyers who pursue motor vehicle-related litigation to advertise without the benefit of personal information stored in government databases, just as other class action lawyers, and all other commercial entities, must. Similarly, while the DPPA permits lawyers to obtain protected information—including highly sensitive information such as social security numbers and medical conditions—to *investigate* claims and potential claims, mass *solicitation* of clients is not necessary to such investigations. In this case, respondents did not need to solicit 34,000 potential plaintiffs to determine whether the four individuals who retained them could assert a "group action" claim. Nor was such mass solicitation necessary to protect the rights of other car buyers. In all events, the scope of the DPPA's litigation exception does not vary based on the vagaries of state causes of action and the ethical duties of the lawyers who pursue them. The Court should reverse and remand.

B. Statutory Background

Congress enacted the DPPA in response to concerns that sensitive personal information collected by state DMVs was being disclosed and used. To obtain a driver's license or register a vehicle, state DMVs require an individual to disclose a considerable amount of personal information, such as the individual's name, date of birth, place of birth, gender, race, address, medical conditions, or social security number.

See, *e.g.*, S.C. Code Ann. § 56-1-20 (requiring driver's license); *id.* § 56-1-90 (identification requirements for license application); *id.* § 56-1-130 (medical information for license); *id.* § 56-3-240 (required information for vehicle registration); see also *id.* §§ 56-3-110, 56-3-200 (requiring license and registration).

Congress learned that this government-collected information was being regularly disclosed and used for purposes unrelated to the reasons individuals had entrusted it to state DMVs. For instance, Congress heard that, on numerous occasions, women had become victims of violence because stalkers, assailants, or abusive relatives had obtained and used their personal information from state DMVs.[1] Also, state DMVs had regularly sold personal information to industries that used it to support direct marketing and solicitation.[2] Congress passed the DPPA to help protect the safety and privacy of Americans.[3]

The Act provides that a state DMV "and any officer, employee, or contractor thereof, shall not knowingly

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[1] *See, e.g.*, 140 Cong. Rec. 7924–25 (1994) (statement of Rep. Moran); 139 Cong. Rec. 29,469 (1993) (statement of Sen. Robb); *id.* at 29,470 (statement of Sen. Harkin); 1994 WL 212698 (Feb. 4, 1994) (statement of Rep. Moran); 1994 WL 212822 (Feb. 3, 1994) (statement of National Victim Center); 1994 WL 212833 (Feb. 3, 1994) (statement of Fraternal Order of Police).

[2] *See, e.g.*, 1994 WL 212836 (Feb. 3, 1994) (statement of Direct Marketing Association) (discussing marketing efforts of automotive industry); 1994 WL 212834 (Feb. 3, 1994) (statement of Prof. Mary J. Culnan) (discussing use of personal information by direct marketers and database compilers).

[3] *See, e.g.*, 139 Cong. Rec. 29,467–68 (1993) (statement of Sen. Boxer) (discussing the goal of "protect[ing] the privacy and safety of all Americans"); *id.* at 26,267 (statement of Sen. Warner) ("both personal privacy and personal safety are disappearing and this legislation would help to protect both").

disclose or otherwise make available" two types of information that were "obtained by the department in connection with a motor vehicle record": (1) "personal information" and (2) "highly restricted personal information." § 2721(a)(1)–(2).[4] "Personal information" is defined as "information that identifies an individual, including [a] driver identification number, name, address ..., [or] telephone number, ... but does not include information on vehicular accidents, driving violations, and driver's status." § 2725(3). The Act defines "highly restricted personal information" as "an individual's photograph or image, social security number, medical or disability information." § 2725(4).

The DPPA's ban on the disclosure of "personal information" is subject to certain express exceptions set forth in subsection (b) of § 2721. That subsection requires the disclosure of personal information for uses related to motor vehicle or driver safety and theft, as well as for certain uses related to the regulation of motor vehicles under state and federal laws. § 2721(b). It also enumerates fourteen other discrete exceptions for which personal information "may be disclosed." *Id.* For instance, subsection (b) permits disclosure for use by a government agency in carrying out its functions, § 2721(b)(1); for use by an insurer "in connection with claims investigation activities ... or underwriting," § 2721(b)(6); or for use by an employer to verify driver's license information, § 2721(b)(9). Under subsection (b)(4), state DMVs may also disclose personal information:

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[4] Unless otherwise indicated, all references are to Title 18 the 2012 version of the United States Code.

> [f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

§ 2721(b)(4). This is commonly referred to as the "litigation exception."

Subsection (b) also contains a "solicitation exception," which is found in subsection (b)(12). As originally enacted, this exception created an "opt-out" regime that allowed a state DMV to disclose personal information for purposes of surveys, marketing, or solicitation only if the DMV had implemented procedures that gave individuals an opportunity to prohibit such disclosures. § 2721(b)(12) (1994); *Condon*, 528 U.S. at 144. In 1999, Congress amended the solicitation exception to make it even more restrictive and protective of privacy interests. It "changed this 'opt-out' alternative to an 'opt-in' requirement" that permits disclosures of personal information for purposes of solicitation only if an individual has given the state express consent. *Condon*, 528 U.S. at 144–45. Thus, as amended, the Act now provides that personal information may be disclosed "[f]or bulk distribution for surveys, marketing or solicitations *if* the State has obtained the *express consent* of the person to whom such personal information pertains." § 2721(b)(12) (emphases added).

For highly restricted personal information, the DPPA creates a more restrictive regime. Only four exceptions authorize the disclosure or use of such information. Thus, highly restricted information may be disclosed for "uses permitted" by the governmen-

tal-function exception in (b)(1), the litigation exception in (b)(4), the insurer exception in (b)(6), and the employer-verification exception in (b)(9). § 2721(b)(2).

In addition to regulating the disclosure of information by a state DMV, the DPPA makes it "unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b)." § 2722(a). The Act also creates a private cause of action against any "person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter." § 2724(a).

C. Factual Background

1. Petitioners Edward F. Maracich, Martha L. Weeks, and John C. Tanner are South Carolina residents whose personal information was obtained from the South Carolina DMV and then used without their consent as part of a bulk solicitation by lawyers seeking potential clients. Joint Appendix at 500–08, *Maracich* v. *Spears*, No. 10-2021 (4th Cir. filed Dec. 10, 2010) (CA4 JA). Maracich received a solicitation letter in March 2007. *Id.* at 500; Pet. App. 13a. This letter had the phrase "ADVERTISING MATERIAL" emblazoned across the top. See, *e.g.*, CA4 JA 502; Pet. App. 10a; see also Joint Appendix (App.) 101–02. The body of the letter stated that respondents were lawyers who "represent a group of consumers in a pending lawsuit" against South Carolina car dealerships concerning allegedly unlawful administrative fees. CA4 JA 502. Respondents stated that they understood Maracich "may have been charged one of these fees on [his] recent purchase of an automobile," and said that they "would like the opportunity [to] discuss [his] rights and options ... in a free consultation." *Id.* The letter stated that respondents had obtained in-

formation about Maracich "in response to a Freedom of Information Act [(FOIA)] request to the South Carolina Department of Motor Vehicles." *Id.* The letter said nothing about the loss or impairment of any rights if Maracich failed to participate in the pending lawsuit. Nor did it state that respondents already represented Maracich or were under any ethical obligation to protect his interests. To the contrary, the letter noted that he was free to consult with other lawyers. *Id.*

Petitioners Weeks and Tanner received nearly identical letters in approximately May of 2007. CA4 JA 506; App. 280–81, 283; Pet. App. 13a. These letters were also denominated "ADVERTISING MATERIAL," noted the lawsuit respondents were pursuing on behalf of others, and sought an "opportunity [to] discuss [Weeks's and Tanner's] rights and options with a free consultation." App. 283–84; CA4 JA 508. Like the letter Maracich received, these letters stated that respondents had obtained information about Weeks and Tanner in response to a FOIA request to the South Carolina DMV. App. 283; CA4 JA 508. These letters likewise did not mention any existing attorney-client relationship or ethical obligations; nor did they state that the recipients might forfeit rights or otherwise be prejudiced by failing to participate in the lawsuit. *Id.*

In response to his letter, Tanner called Richard A. Harpootlian, one of the respondents listed on the letter. App. 281. On this call, Harpootlian "made an aggressive sales pitch" in an attempt to get Tanner "to sign up as a client for a lawsuit against the dealership from which [he] had purchased [his] car." *Id.*; see Pet. App. 13a. According to Tanner, Harpootlian stated that, if Tanner "agreed to be his client," Harpootlian "would get [Tanner] two to three times what

[Tanner] had paid in fees to the dealership." App. 281. During the call, Harpootlian expressed no interest in discovering any facts about Tanner's "interaction with the dealership who sold" his car. *Id.* at 281–82. Rather, he "expressed interest only in signing [Tanner] up as a client." *Id.* at 282. When Tanner asked how respondents had obtained his name and address, Harpootlian confirmed they had obtained this information from the DMV. *Id.* at 281.

Petitioners have never given consent to the South Carolina DMV to disclose their personal information for purposes of surveys, marketing, or solicitation. App. 282; CA4 JA 500, 506.

2. Petitioners soon learned that respondents' use of their personal information from the South Carolina DMV for purposes of solicitation was part of a much broader advertising campaign. Beginning in June 2006, respondents were approached by individual car buyers who complained about the administrative fees charged by automobile dealerships in certain South Carolina counties. Pet. App. 6a. Later that month, respondents submitted an initial FOIA request to the South Carolina DMV. App. 57–58. The request stated that respondents represented "plaintiffs who have complained of certain conduct as a result of their transactions with car dealers." *Id.* at 57. It stated further that the request was made "in anticipation of litigation ... pursuant to" the DPPA's litigation exception and that respondents sought information concerning "[p]rivate purchases of new or used automobiles" in a particular county, "including the name, address, and telephone number of the buyer" and the "dealership where purchased." *Id.*

Two months later, respondents made a second FOIA request for similar information specific to five additional counties. App. 67–68. The South Carolina

DMV provided responsive information to these and all other relevant FOIA requests by respondents. Pet. App. 7a–8a, 9a, 11a.

A few days after their second FOIA request, respondents filed a lawsuit captioned *Herron* v. *CarMax Auto Superstores, Inc.* in South Carolina state court against 51 car dealerships. Pet. App. 8a. The complaint alleged that the car dealerships charged unlawful fees in violation of, among other laws, South Carolina's Manufacturers, Distributors, and Dealers Act, S.C. Code Ann. §§ 56-10-10 *et seq.* Pet. App. 8a, 48a. Respondents filed this lawsuit on behalf of four named plaintiffs and as a purported "group action" on behalf of other car buyers who paid the allegedly unlawful fees. Pet. App. 8a, 48a; see also S.C. Code Ann. § 56-15-110 (allowing "one or more [to] sue for the benefit of the whole"). Shortly after the complaint was filed, most of the car dealerships filed motions to dismiss, contending that the named plaintiffs lacked standing to pursue claims against car dealerships from which they had not purchased a car. Pet. App. 9a; CA4 JA 184.

At the end of October 2006, respondents sent another FOIA request to the South Carolina DMV, seeking personal information about car buyers who had bought automobiles from a list of 328 car dealers in the state. Pet. App. 9a; App. 69–82. Five days later, respondents filed an amended complaint in the *Herron* lawsuit, adding four named plaintiffs and increasing the number of defendants to 324. Pet. App. 9a. As with the initial complaint, many of the car dealerships moved to dismiss for lack of standing. *Id.*

On January 4, 2007, respondents used the DMV information from their FOIA requests to send their first round of solicitation letters to car buyers. Pet. App. 9a. These letters were nearly identical to those later

sent to petitioners. *Id.* Respondents filed a copy of their January 4 letters and a list of the recipients' names and addresses with the South Carolina Office of Disciplinary Counsel in accordance with South Carolina Rule of Professional Conduct 7.3, which regulates the solicitation of prospective clients. *Id.* at 11a; see App. 89–95. As a result, the recipients' names and addresses became publicly available. See CA4 JA 484.

In January, respondents also submitted three additional FOIA requests to the South Carolina DMV, requesting personal information about additional car buyers. Pet. App. 11a. Respondents then sent additional mass mailings of solicitation letters on January 23, March 1, March 5, and May 8, 2007. *Id.* at 12a–13a, 49a. In each case, respondents filed a copy of their letters and a list of the recipients' names and addresses with the South Carolina Office of Disciplinary Counsel. *Id.* at 50a. In total, respondents used the information from their FOIA requests to send letters to over 34,000 car buyers in South Carolina. *Id.* at 12a–13a. Petitioners received letters from the March 1 and May 8 mailings. CA4 JA 500–08.

In June 2007, in response to continuing disputes over standing in the *Herron* lawsuit, respondents sought to amend their complaint to add nearly 250 plaintiffs. Pet. App. 13a. These additional plaintiffs had each responded to the solicitation letters sent by respondents. *Id.* The court denied leave to amend the complaint and held that the remaining plaintiffs had standing to sue only the dealerships from which they had purchased automobiles and any coconspirators. *Id.* at 13a–14a.

D. Proceedings Below

1. After discovering the breadth of the solicitation campaign respondents had conducted using information from the South Carolina DMV, petitioners filed a class action lawsuit, alleging that respondents had violated the DPPA by obtaining, disclosing, and using personal information from DMV records for bulk solicitation without the express consent of petitioners and the other members of the class petitioners seek to represent. Pet. App. 4a; App. 47–48.

Respondents moved to dismiss. Pet. App. 86a. They argued, among other things, that their acquisition and use of personal information from the South Carolina DMV fell within the litigation and governmental-function exceptions, because those uses were assertedly "in connection with" litigation, and because, as group representatives in the *Herron* lawsuit, respondents were assertedly "acting on behalf" of South Carolina in carrying out its governmental function. Pet. App. 92a–97a. The district court denied the motion. *Id.* at 17a–18a, 92a–97a, 101a.

2. Approximately one year later, the district court reversed itself in ruling on cross-motions for summary judgment. As an initial matter, the court concluded that the letters respondents sent to petitioners and other car buyers were not solicitations "as a matter of law," because respondents as group representatives in *Herron* were already acting on behalf of petitioners. Pet. App. 61a. The court then held that, even if the letters were solicitations, and even though the solicitation exception's express-consent requirement was not satisfied, respondents' uses of personal information from the DMV were independently permitted by the litigation exception. *Id.* at 62a–79a. According to the district court, "obtaining and using the personal information in order to respond to potential-

ly dispositive motions" in the *Herron* case "falls squarely within the litigation exception." *Id.* at 78a; see also *id.* at 76a. The court also found that respondents satisfied the governmental-function exception because they used the personal information in their role "as 'private attorneys general'" in bringing the group action in *Herron*. *Id.* at 80a. Accordingly, the court granted respondents' summary-judgment motion and denied petitioners' cross-motion.

3. The Fourth Circuit affirmed on slightly different grounds. It first held that the district court erred as a matter of law in holding that respondents' letters were not solicitations. Pet. App. 5a, 28a–29a. The court held that, under an objective standard, respondents' letters to car buyers were "solicitations" within the meaning of the DPPA because they were entirely consistent with the "common understanding of the meaning of" solicitation "as targeted lawyer advertising aimed at affording representation to potential clients." *Id.* at 28a.

Nonetheless, the court of appeals held that respondents cannot be liable under the DPPA because, even if their conduct "amount[ed] to prohibited solicitation (i.e., that prohibited absent express consent)" under subsection (b)(12), it was permitted by the litigation exception of (b)(4). Pet. App. 39a, 41a–42a. Reasoning that these subsections are "'not mutually exclusive,'" *id.* at 34a, the lower court ruled that, when "solicitation is an accepted and expected element of, and is inextricably intertwined with, conduct satisfying the litigation exception under the DPPA, such solicitation is not actionable by persons to whom the personal information pertains," even in the absence of their express consent, *id.* at 5a.

The court concluded that respondents' nonconsensual solicitations were authorized because they "al-

ways had only one use as their purpose, i.e., litigation." Pet. App. 37a. Because, in the court's view, respondents' solicitations were "inextricably intertwined with [their] permissible use of [petitioners'] personal information pursuant to the litigation exception," *id.* at 29a, respondents were not liable under the DPPA as a matter of law. According to the lower court, any other conclusion would be "contrary to the public interest benefits that can inhere in impact litigation specifically aimed at protecting consumers on a broad scale." *Id.* at 38a. The court opined that respondents "simply could not make appropriate, efficient and ethical use of [petitioners'] personal information under [its] pragmatic approach to the litigation exception without first engaging in solicitation." *Id.*[5]

SUMMARY OF ARGUMENT

I. The DPPA's solicitation exception governs this case under the bedrock rule of statutory interpretation that a specific statutory provision governs a general one. In the solicitation exception, Congress addressed a specific problem (using personal information for bulk solicitation) and provided a specific, fine-tuned solution (express consent). Because Congress specifically required express consent as a condition of using DPPA-protected personal information for bulk solicitation, that requirement must be satisfied and cannot be evaded by relying on a more general provision, even if the general provision's terms could otherwise be read to authorize bulk solicitation. As this Court has long held, and reiterated just last Term in an analytically indistinguishable case, general lan-

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[5] Because the court of appeals concluded that respondents' solicitations were authorized under the litigation exception, it did not decide whether the governmental-function exception applies. Pet. App. 23a n.9. That issue is not before this Court.

guage of a statutory provision does not apply to a matter specifically dealt with in another part of the same statute. *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2070–71 (2012).

As a result, the litigation exception's general language cannot be read to exempt one group of commercial actors alone—lawyers who handle motor vehicle-related litigation—from the solicitation exception's express-consent requirement. Unlike the solicitation exception, which speaks directly to the question of bulk solicitation, the litigation exception is a generally worded provision that authorizes a range of uses of personal information but says nothing specifically about bulk solicitation. The solicitation exception is thus the more specific provision, and its express-consent requirement must be complied with even if the litigation exception's general language otherwise could be read to authorize bulk solicitation of potential clients.

II. Even apart from the general/specific canon, the litigation exception does not clash with—much less override—the solicitation exception's express-consent requirement. The text, structure, and purpose of the DPPA show that the litigation exception permits uses of protected information to promote the integrity and efficacy of adjudicative proceedings, not the commercial interests of lawyers. It thus does not authorize disclosure of protected information to enable lawyers to solicit clients.

The Fourth Circuit based its contrary, and admittedly expansive, interpretation on the phrases "in connection with" and "in anticipation of." This unduly narrow focus conflicts with this Court's cases holding that statutory phrases should not be read in isolation, and with its admonition against uncritically literal interpretations of indeterminate phrases like "in con-

nection with," which must be read in light of the structure and purpose of the statute as a whole. Here, the structure and purpose of the DPPA make clear that Congress did not authorize lawyers to use personal information to solicit clients. The Act's central provision is a broad prohibition on disclosure and use of protected information. As an exception to that general rule, the litigation exception is to be construed narrowly. This is particularly true here, because subsection (b)(4) is an exceptional exception: it is one of only four provisions that permit use of highly restricted personal information without consent. That Congress afforded lawyers access to especially sensitive information such as social security numbers and disability status underscores that the litigation exception is intended to promote the integrity of adjudicative processes, not to confer a unique privilege on lawyers who handle motor vehicle-related litigation to use information in DMV databases to solicit business.

The express examples Congress provided in the text of the litigation exception itself, including "investigation in anticipation of litigation," confirm that the exception allows lawyers, as officers of the court, to use personal information in furtherance of the court's adjudicative functions, not to advance their own commercial interests. A contrary interpretation would lead to absurd results under other exceptions in the Act that use the same "in connection with" language as the litigation exception, and would undermine the important privacy and safety interests the DPPA was designed to protect.

III. The Fourth Circuit's alternative and wholly novel theory—that conduct violative of the solicitation exception is nevertheless permissible if it is "inextricably intertwined" with non-solicitation conduct

permitted under the litigation exception—has no basis in the statute and is, in all events, factually unfounded. The solicitation exception's express-consent requirement cannot be evaded on the ground that solicitation is "inextricably intertwined" with conduct permitted by another exception. The Fourth Circuit's contrary ruling effectively amends the statute's text.

Respondents' solicitations, moreover, were not necessary to any legitimate use: Respondents could have achieved their purported investigative purposes without *soliciting* anyone. The summary-judgment record shows that respondents' *only* purpose in obtaining and using the information was to solicit potential clients, not to investigate in anticipation of litigation. But even if respondents obtained and initially used the information for legitimate investigative purposes, their solicitations were separate and distinct uses of protected information that violated the DPPA. Respondents cannot escape liability for these unauthorized solicitations by relying on purported ethical duties under state law. Respondents had no duty to solicit the unnamed car buyers, let alone to use DPPA-protected personal information to do so. And state law cannot in any event trump the DPPA.

ARGUMENT

The DPPA's solicitation exception provides that an individual's personal information may be used for "bulk ... solicitations," but only "if the State has obtained the express consent of the person to whom such personal information pertains." § 2721(b)(12). Respondents' acquisition, use, and disclosure of DMV-derived personal information about petitioners and tens of thousands of other potential class members plainly was not authorized under the solicitation exception. The Fourth Circuit correctly held that res-

pondents' mass mailings constituted "solicitations." That holding was compelled by, among other things, the letters' content and respondents' filings with the South Carolina Office of Disciplinary Counsel, and respondents did not ask this Court to review that holding. See Sup. Ct. R. 15.2; *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011). It is undisputed, moreover, that petitioners and the class they seek to represent did not expressly consent to this use of their personal information.

By failing to comply with the solicitation exception's express-consent requirement, respondents violated the DPPA. As the only provision of the DPPA that specifically addresses bulk solicitation, the solicitation exception controls. Neither the litigation exception nor any other exception authorized respondents' acquisition, disclosure, and use of petitioners' personal information for bulk solicitation, and respondents' conduct cannot be justified on the ground that it was "inextricably intertwined" with other conduct permitted by the litigation exception. The Fourth Circuit's contrary decision violates settled principles of statutory interpretation, undermines the privacy and safety interests protected by the DPPA, and should be reversed.

I. THE SOLICITATION EXCEPTION CONTROLS THIS CASE.

It is a "commonplace of statutory construction that the specific governs the general." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). "That is particularly true where, as [here], 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" *RadLAX*, 132 S. Ct. at 2071 (quoting *Varity Corp.* v. *Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting)). The rationale for this canon is that, when Con-

gress has focused on a specific problem and "observed all the circumstances of the case and provided for them," it does not intend a general provision "to derogate from its own act when it makes no special mention of its intention so to do." *Rodgers* v. *United States*, 185 U.S. 83, 88 (1902) (internal quotation marks omitted); see also *id.* at 89 (a general provision does not control "a special provision in respect to a matter to which the attention of Congress was at the time directed").

Applying these principles, this Court has repeatedly held that when a statutory provision specifically authorizes a given action subject to specified conditions or limitations, those conditions and limitations must be satisfied and cannot be circumvented by relying upon a general provision in the same statute, even if the general provision's terms otherwise could be construed to authorize the action at issue. That principle governs this case: The solicitation exception specifically authorizes use of DPPA-protected personal information for bulk solicitation, subject to the requirement that the state first obtain the affected individuals' express consent. The solicitation exception's express-consent requirement cannot be evaded by relying on the litigation exception's general terms, even if they could otherwise be read to authorize bulk solicitation of potential clients.

II. CONGRESS PROVIDED A SPECIFIC SOLUTION—EXPRESS CONSENT—TO THE DELIBERATELY TARGETED PROBLEM OF DISCLOSURE AND USE OF PERSONAL INFORMATION FOR BULK SOLICITATIONS.

A major impetus behind enactment of the DPPA was Congress's finding that state DMVs sold personal information to individuals and businesses. *Condon*,

528 U.S. at 143. In particular, the personal information sold by state DMVs was used extensively to support the direct-marketing efforts of businesses. See Br. of the United States at 3–5, *Reno* v. *Condon*, 528 U.S. 141 (U.S. filed July 15, 1999) (No. 98-1464) (collecting testimony before Congress and other legislative history). Disapproving of this practice, Congress responded with a specific solution: prohibiting the disclosure, acquisition, and use of personal information from DMVs for bulk solicitation unless the state has obtained the express consent of the individuals whose information is disclosed.

As noted earlier, the solicitation exception originally provided that personal information could be used for bulk solicitation "if the State provided drivers with an opportunity to block disclosure of their personal information when they received or renewed their licenses and drivers did not avail themselves of that opportunity." *Condon*, 528 U.S. at 144. Concluding that this opt-out procedure was not sufficiently protective of individuals' privacy, Congress in 1999 amended the solicitation provision to its current form, requiring the state to "obtain a driver's affirmative consent to disclose the driver's personal information for use in surveys, marketing, solicitations, and other restricted purposes." *Id.* at 144–45 (citing Pub. L. No. 106-69, § 350(c)–(e), 113 Stat. 986); see also 145 Cong. Rec. 23,699 (1999) (statement of Sen. Shelby) (expressing concern "that private information is too available").

The importance of consent in the overall scheme of the DPPA is underscored by several other provisions. *First*, the DPPA's general prohibition bars disclosure of personal information and highly restricted personal information "without the express consent of the person to whom such information applies." § 2721(a);

see also *Condon*, 528 U.S. at 144 ("The DPPA establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent."). *Second*, in addition to the solicitation exception, two other exceptions likewise permit disclosure only with express or written consent. § 2721(b)(11), (13). *Third*, the DPPA expressly prohibits states from conditioning or burdening "in any way the issuance of an individual's motor vehicle record ... to obtain express consent." § 2721(e).

Fourth, other provisions permit private parties to use personal information (but not highly restricted personal information) without consent only for narrow and discrete purposes. Thus, private parties may obtain and use personal information to verify information provided to them, § 2721(b)(3); for matters involving vehicle and driver safety; vehicle theft, recalls, and advisories; performance monitoring of motor vehicles, motor vehicle parts, or dealers; or motor vehicle market research activities, § 2721(b)(2); to notify owners that their cars have been towed or impounded, § 2721(b)(7); to operate private toll facilities, § 2721(b)(10); for research activities, provided that the information is not published, re-disclosed, or used to contact individuals, § 2721(b)(5); or for uses "specifically authorized under the law of the State that holds" the motor vehicle record, but only if that authorized use "is related to the operation of a motor vehicle or public safety," § 2721(b)(14). None of these exceptions authorizes private individuals to use protected personal information to propose commercial transactions without express consent.

The narrow scope of these exceptions is underscored by the subsection that immediately follows the DPPA's exceptions. It provides that an "authorized recipient of personal information (except a recipient

under subsection (b)(11) or (b)(12)) may resell or re-disclose the information only for a use permitted under subsection (b) (but *not for uses under subsection (b)(11) or (b)(12)).*" § 2721(c) (emphasis added). Subsection (c) thus reinforces the importance of the express-consent requirement, by barring private parties from obtaining personal information for any of the limited purposes for which consent is not required, then reselling or re-disclosing that information for purposes that require consent. Subsection (c) further provides that recipients under the (b)(12) solicitation exception may resell or re-disclose personal information only for this same purpose, thereby confirming that only information obtained with express consent can be resold or re-disclosed for bulk solicitation purposes.[6]

In short, subsection (b)(12) is part of "a comprehensive scheme" and reflects that Congress "has deliberately targeted [a] specific proble[m]"—bulk solicitations using DMV-derived personal information—"with [a] specific solution[n]"—a prohibition on such solicitation absent express consent. *RadLAX*, 132 S. Ct. at 2071 (internal quotation marks omitted). As we show next, this specific provision necessarily controls over any other provision of the DPPA that might otherwise apply to bulk solicitations.

A. Under Settled Principles Of Statutory Interpretation, A Specific Authorization Controls A General One.

The interpretive canon that a specific provision governs over a more general one has a number of applications. It "is perhaps most frequently applied to sta-

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[6] Subsection (c) also permits a recipient under subsection (b)(11), which also requires express consent, to resell or re-disclose personal information for any purpose. § 2721(c).

tutes in which a general permission or prohibition is contradicted by a specific prohibition or permission." *RadLAX*, 132 S. Ct. at 2071. "To eliminate the contradiction, the specific provision is construed as an exception to the general one." *Id.* But the canon is not limited to situations in which two provisions directly conflict. It "has full application as well to statutes such as the one here, in which a general authorization and a more limited, specific authorization exist side-by-side." *Id.* The canon holds that when the conduct at issue falls within the more specific authorization, "[t]he terms of the specific authorization must be complied with." *Id.*

The Court applied this latter version of the canon just last Term in *RadLAX*. There the Court considered a provision of the bankruptcy code that created three exceptions to the general rule that a Chapter 11 bankruptcy plan may not be confirmed without the affected creditors' consent. *Id.* at 2069. The second exception provided that a plan authorizing the sale of a debtor's assets free and clear of a creditor's lien could be approved without the creditor's consent, subject to the requirement that the creditor be permitted to "credit-bid" at the sale. *Id.* at 2070. The third exception did not specifically address elimination of the creditor's lien or credit-bidding, but more generally authorized confirmation of a nonconsensual plan if it provided for realization of the "'indubitable equivalent'" of the creditor's claims. *Id.* The question presented was whether a nonconsensual plan providing for the sale of collateral free and clear of the creditor's lien could be approved under the third exception if the plan satisfied the "indubitable equivalent" requirement but did not permit credit-bidding.

Applying the general/specific canon, the Court held that such a plan could not be confirmed under the

third exception, even though the exception's "'general language,'" read in isolation, was "'broad enough'" to authorize confirmation. *Id.* at 2071 (alteration omitted). That was so because the second exception specifically "spell[ed] out the requirements for selling collateral free of liens," whereas the third exception was "a broadly worded provision that sa[id] nothing about such a sale." *Id.* In other words, because the second exception specifically addressed the conduct at issue—sale of collateral free of liens—its requirement that the creditor be permitted to credit-bid had to be complied with, and could not be circumvented by proceeding under a more general exception. The second exception was thus the exclusive "rule for plans under which the property is sold free and clear of the creditor's lien." *Id.* at 2072.

RadLAX built on a long line of cases in which this Court has held that "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same statute." *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932). In *Bloate* v. *United States*, 130 S. Ct. 1345 (2010), for example, the Court held that the time granted to a party to prepare pretrial motions was not automatically excludable from the Speedy Trial Act's 70-day time limit, because Congress had specifically addressed delay resulting from pretrial motions and provided that only the time from the filing of the motion through its disposition was automatically excludable. *Id.* at 1351–58. Because Congress had expressly addressed pretrial-motion-related delay in a specific provision, resort could not be had to a more general provision addressing delay resulting from "proceedings concerning the defendant." *Id.* at 1352–55. Rather, the Court held, delay that fell within the

category Congress had specifically addressed was "governed by the limits" Congress imposed in the specific provision, and those limits could not be evaded by relying on a general provision that was not so limited, even though the delay might otherwise have fallen with the general provision's terms. *Id.* at 1354.

The same principle was applied in *HCSC-Laundry* v. *United States*, 450 U.S. 1 (1981) (per curiam), where the Court held that a cooperative hospital service organization that provided laundry service could not qualify for income tax exemption under the general provision exempting charitable organizations because Congress had specifically addressed cooperative hospital service organizations in a separate provision and had omitted laundry service from the list of services qualifying for the exemption. *Id.* at 5–6. The Court cited the "basic principle of statutory construction" that a specific statute controls a general one, "particularly when the two are interrelated and closely positioned, both in fact being parts of" the same statute. *Id.* at 6. Thus, "despite the seemingly broad general language" of the provision authorizing tax exemption for charitable organizations, the Court held that the specific provision addressing cooperative hospital service organizations was the only provision under which those organizations could qualify for exemption. *Id.* at 6–8.

Other cases are in accord. See, *e.g.*, *D. Ginsberg & Sons*, 285 U.S. at 206–09 (holding that a specific provision prescribing the procedures for the arrest and detention of bankrupts about to flee the district could not be circumvented by relying on a general provision allowing bankruptcy courts to make such orders as were necessary to enforce the statute); *United States* v. *Chase*, 135 U.S. 255, 259–60 (1890) (holding that a statute proscribing the mailing of indecent "'writ-

ing[s]'" did not apply to indecent letters because a separate clause specifically addressed letters and proscribed only letters "whose indecent matter is exposed on the envelope"); *Rodgers*, 185 U.S. at 87–89 (holding that a provision specifically addressing the salary of rear admirals controlled a provision addressing the salary of naval officers generally).

The lesson of these cases is that when a provision in a statute specifically authorizes a given action subject to specified conditions or limitations, and when the conduct at issue falls within the specific authorization, "[t]he terms of the specific authorization must be complied with," and cannot "be avoided by relying upon a general provision" in the same statute. *RadLAX*, 132 S. Ct. at 2071. As the Court explained more than a century ago, "'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.'" *Chase*, 135 U.S. at 260. "This rule," which has lost none of its vitality, "applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include." *Id.* In such cases, "the special provision must be taken as an exception to and limitation of the general rule." *Rodgers*, 185 U.S. at 89.[7]

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[7] The Court has also applied this rule in reconciling general and specific authorizations in separate statutes. *See, e.g.*, *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 152–58 (1976) (holding that a specific venue provision authorizing suits against national banks only in the district where the bank was established controlled a broad venue provision authorizing suits

B. The Solicitation Exception Is The Most Specific Provision Concerning Use Of DPPA-Protected Information For Mass Solicitation Of Potential Clients.

1. Under these cases, and the "well established principles of statutory construction" they apply, the solicitation exception governs the mass solicitation activity at issue in this case. *RadLAX*, 132 S. Ct. at 2073. In that exception, Congress specifically addressed use of personal information for bulk solicitation and authorized such use only "if the State has obtained the express consent of the person to whom such personal information pertains." § 2721(b)(12). Because Congress specifically required express consent as a condition of using personal information for bulk solicitation, that limitation "must be complied with," and cannot "be avoided by relying upon a general provision" like the litigation exception. *RadLAX*, 132 S. Ct. at 2071.

Indeed, this case is analytically indistinguishable from *RadLAX*. Like the bankruptcy statute at issue there, which prohibited nonconsensual plans subject to specified exceptions, the DPPA establishes a broad prohibition on use of personal information followed by

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under the Securities Exchange Act of 1934 in any district where the defendant could be found); *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 754–61 (1961) (holding that a specific provision authorizing interest on overpayment of taxes attributable to an excess profits credit carry-back controlled a general provision authorizing interest on judgments for overpayment of taxes); *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 224–29 (1957) (holding that a specific venue provision authorizing patent-infringement suits only in the district where the defendant resided or committed the infringement and had a regular place of business controlled a general venue provision authorizing suits against corporations in any district where they were incorporated, were licensed to do business, or did business).

enumerated exceptions. Like the second exception in *RadLAX*, which specifically authorized sale of collateral free of liens subject to the requirement that creditors be permitted to credit-bid, the DPPA's solicitation exception specifically authorizes use of an individual's personal information for bulk solicitation subject to the requirement that the state obtain that individual's express consent. And like the third exception in *RadLAX*, which was a more "broadly worded provision that sa[id] nothing about" liens, *id.*, the DPPA's litigation exception is a more general provision that says nothing about solicitation. Thus, as in *RadLAX*, the litigation exception's "'general language,'" even if "'broad enough to include it, will not be held to apply to a matter specifically dealt with'" in the solicitation exception. *Id.* at 2071–72.

2. The court of appeals wrongly concluded that the solicitation and litigation exceptions "are equally specific." Pet. App. 34a. With respect to the conduct at issue—bulk solicitation of potential clients—the solicitation exception is the more specific provision. It expressly addresses bulk solicitation and spells out the requirement—express consent—for using personal information for that purpose. The solicitation exception makes clear that Congress focused specifically on the problem of bulk solicitation and adopted a targeted solution. See *RadLAX*, 132 S. Ct. 2071 (the general/specific canon applies with particular force when "'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions'"). By contrast, the litigation exception covers a range of possible uses and says nothing specifically about solicitation, much less bulk solicitation. The solicitation exception is thus more specific in the same sense that the second exception was more specific than the third exception in

RadLAX. See *id.* (the second exception "spell[ed] out the requirements for selling collateral free of liens," whereas the third exception "sa[id] nothing about such a sale").

Likewise, it does not matter that the solicitation and litigation exceptions "'both apply to situations not governed by the other.'" Pet. App. 34a. The general/specific canon is not "confined to situations in which the entirety of the specific provision is a 'subset' of the general one." *RadLAX*, 132 S. Ct. at 2072. "When the conduct at issue falls within the scope of *both* provisions, the specific presumptively governs, whether or not the specific provision also applies to some conduct that falls outside the general." *Id.* Thus, even if bulk solicitation of potential clients for a lawsuit fell within the scope of both the solicitation and litigation exceptions, the solicitation exception would "presumptively gover[n]." *Id.*

The court of appeals also erred in concluding that the solicitation and litigation exceptions are "'not mutually exclusive.'" Pet. App. 34a. This Court's cases make clear that a specific authorization *exclusively* governs the conduct it addresses, and its requirements cannot be evaded by resorting to a more general authorization. See *RadLAX*, 132 S. Ct. at 2073 n.4 ("*after* applying the canon," the general authorization "will no longer be deemed applicable" to the conduct addressed by the specific authorization); *Bloate*, 130 S. Ct. at 1355 (a specific authorization "conclusively" governs the conduct it addresses unless it indicates otherwise); *HCSC*, 450 U.S. at 6 (a specific authorization is "exclusive and controlling" for the conduct it addresses); *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957) (a specific authorization is "the sole and exclusive provision controlling" the conduct it addresses).

For this same reason, recognizing that personal information may not be used for mass solicitation of clients absent express consent does not mean that respondents must satisfy both the solicitation exception and the litigation exception. "The question here is not whether [respondents] must comply with more than one [exception], but rather which one of the [exceptions] they must satisfy." *RadLAX*, 132 S. Ct. at 2072. Because respondents used DPPA-protected personal information for bulk solicitation, they must satisfy the solicitation exception's express-consent requirement, and cannot evade that requirement by relying on the litigation exception's general language, even if that language could otherwise be read broadly to authorize bulk solicitation of potential clients for a lawsuit. But see *infra*, Part III.

Also misplaced was the court of appeals' reliance on *Connecticut National Bank* v. *Germain*, 503 U.S. 249 (1992). That case held that a provision granting courts of appeals jurisdiction over final decisions of bankruptcy courts and bankruptcy appellate panels did not impliedly repeal the general provision granting appellate jurisdiction over district courts' interlocutory orders. *Id.* at 251–54. In *Germain*, however, the bankruptcy-specific provision did not specifically address interlocutory orders, and the general jurisdictional provision did. *Id.* at 254 ("Section 1292 provides for review [of interlocutory orders]. Section 158(d) is silent as to review of interlocutory orders."). Here the opposite is true: The solicitation exception specifically addresses use of personal information for bulk solicitation, and the litigation exception says nothing on the subject. Moreover, *Germain* applied the standard for implied repeals, under which a statute will not be construed as impliedly repealing an earlier statute unless "there is [a] 'positive repug-

nancy' between [the] two laws." *Id.* at 253. By contrast, here the Court's task is to reconcile two simultaneously enacted provisions of the same statute. See *Varity Corp.*, 516 U.S. at 520 n.1 (Thomas, J., dissenting) ("*Germain* did not involve simultaneously enacted, consecutive provisions of the same Act"). Thus, the cases discussed above, not implied-repeal cases, supply the applicable interpretive principles.

For all these reasons, under the general/specific canon as articulated and applied in this Court's cases, DPPA-protected personal information may not be used for bulk solicitation without complying with the solicitation exception's express-consent requirement, regardless of whether the use would otherwise fall within the litigation exception's general terms. Of course, this canon of interpretation, like all others, "is not an absolute rule, but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction." *RadLAX*, 132 S. Ct. at 2072. Here, however, there are no textual or other indications pointing in the other direction. Rather, as discussed next, even on its own terms, the litigation exception does not authorize use of DPPA-protected personal information for bulk solicitation of potential clients without express consent.

III. THE LITIGATION EXCEPTION DOES NOT OVERRIDE THE SOLICITATION EXCEPTION'S EXPRESS-CONSENT REQUIREMENT AND THEREBY CONFER UNIQUE ADVERTISING PRIVILEGES ON TRIAL LAWYERS.

Notwithstanding the solicitation exception's specific prohibition on use of DMV-derived information for nonconsensual mass advertising, the Fourth Circuit gave an "expansive sweep to the [DPPA's] litigation exception," Pet. App. 30a, and then resolved the re-

sulting tension between the two exceptions by ruling that the latter overrode the former's express-consent requirement. As we have just shown, that resolution was improper under the general/specific principle, which the Fourth Circuit failed to apply properly. But the "manifest tension" the Fourth Circuit perceived between the two exceptions, *id.*, is in fact illusory.

Like all of its counterparts in subsection (b), subsection (b)(4) is an exception to the DPPA's general policy *prohibiting* the disclosure or use of individuals' personal information housed in a state's DMV. §§ 2721(a), 2722(a), 2724(a). Like any other exception to a general prohibition, therefore, this provision is to be construed narrowly, not expansively. Apart from invoking the "benefits [of] ... impact litigation," Pet. App. 38a—a policy nowhere reflected in the DPPA's privacy- and safety-protecting provisions—the Fourth Circuit based its contrary construction primarily on the phrase "in connection with" in the litigation exception, *id.* at 41a–42a. This phrase, however, does not justify the implausible conclusion that Congress decided to confer unique advertising privileges on a single group of commercial actors—lawyers who handle motor vehicle-related litigation—and exempt them alone from the DPPA's otherwise flat prohibition on nonconsensual bulk solicitation. Instead, subsection (b)(4) is a narrow exception designed to protect the integrity and efficacy of adjudicative processes in which lawyers participate, not to promote lawyers' commercial interests.

A. The Fourth Circuit's Interpretation Of The Litigation Exception Rests On An Unduly Narrow And Uncritically Literal Focus On Parts Of The Statute.

In adopting its broad interpretation of subsection (b)(4), the Fourth Circuit focused primarily on the

phrases "in connection with" and "in anticipation of." According to the lower court, the "solicitation of clients by trial lawyers is surely connected to litigation in that representation for a legal claim is the goal." Pet. App. 42a. Any other conclusion, the lower court reasoned, would impose an overly narrow construction on the phrases "in connection with" and "in anticipation of" in this exception. *Id.* at 41a–42a.

This Court has stressed, however, that "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (internal quotation marks and alteration omitted); see also, *e.g.*, *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 60 (2004) ("[s]tatutory construction is a 'holistic endeavor'") (quoting *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988)). As Sir Edward Coke explained long ago, "it is the most natural and genuine expression of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers." 1 Edward Coke, *The First Part of the Institutes of the Laws of England, or a Commentary upon Littleton* § 728, at 381a (14th ed. 1791) (1628), *quoted in* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 24, at 167 (2012).

The Fourth Circuit's interpretation runs afoul of this fundamental principle by focusing unduly on the phrases "in connection with" and "in anticipation of." The latter phrase is part of an illustrative list of permissible uses that confirms that lawyers are given unique access to information in DMV databases—including highly sensitive information such as social

security numbers and disability status—in order to promote the integrity and efficacy of adjudicative processes, not their own commercial interests. Read in conjunction with its companion illustrations, the phrase "in anticipation of" provides no evidence that Congress afforded lawyers a unique ability to advertise using such information. See *infra*, Part III.B.2.

Likewise, the inherently vague phrase "in connection with" must, of necessity, be construed in the context of the full statute of which it is a part. Indeed, this Court has warned against "uncritical literalism" when interpreting the phrase "relating to" in ERISA, *N.Y. State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995)—a phrase the Court has equated with the phrase "in connection with," see *Morales*, 504 U.S. at 383 (defining "relating to" as, *inter alia*, "'to bring into ... *connection with*'" (emphasis added)). Like "relating to," the phrase "in connection with" is essentially "indetermina[te]," because connections, like relations, "stop nowhere." *Travelers*, 514 at 655 (internal quotation marks omitted); see also *id.* at 656 ("For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections.").[8] Interpreting "relating to" in ERISA's preemption provision, this Court has gone "beyond the unhelpful text and the frustrating difficulty of defining its key term, and look[ed] instead to the objectives of the ERISA statute as a guide." *Id.*

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[8] To paraphrase Justice Scalia's concurrence in *California Division of Labor Standards Enforcement* v. *Dillingham Construction, N.A. Inc.*, 519 U.S. 316 (1997), "applying the [phrase 'in connection with'] according to its terms [is] a project doomed to failure, since, as many a curbstone philosopher has observed, everything is [connected] to everything else." *Id.* at 335.

So too here, the Court must look beyond the unhelpful and indeterminate phrase "in connection with" to determine the uses of DMV-derived information that Congress intended to authorize "in connection with" judicial proceedings. We discuss the relevant guideposts for ascertaining the range of permissible uses next.

B. Properly Construed, The Litigation Exception Does Not Permit Solicitation Of Clients By Lawyers.

The phrase "in connection with" signals that Congress intended to permit uses of DMV-derived information beyond direct use as evidence in litigation. This is clear from a comparison of this phrase with Congress's use of the narrower phrase "use in" in other exceptions in subsection (b). Compare § 2721(b)(4) ("use in connection with" proceedings), with § 2721(b)(5) ("use in research activities"), and § 2721(b)(7) ("use in providing notice"). A holistic analysis, however, likewise demonstrates that Congress did not authorize all conceivable uses that have some "connection" with litigation. Instead, read in its entirety and in the full context of the DPPA, the litigation exception is designed to ensure a court or other tribunal's ability to make or effectuate a judgment, not to facilitate commercial transactions by lawyers.

1. The Placement and Function of the Litigation Exception Compel a Narrow Interpretation.

An interpretation of the litigation exception must begin with a recognition of its fundamental function and placement in the DPPA. Subsection (b)(4) is an *exception* to a provision that bars a state DMV "and any officer, employee, or contractor thereof," from "knowingly disclos[ing] or otherwise mak[ing] availa-

ble" personal information or highly restricted personal information "obtained by the department in connection with a motor vehicle record." § 2721(a). Congress underscored the importance of this prohibition, and the privacy and safety interests it is designed to protect, by providing for both civil and criminal fines, and civil liability, against those who impermissibly disclose, receive, or use DPPA-protected information. §§ 2723, 2724.[9]

Under this Court's precedents, therefore, the litigation exception must be interpreted narrowly. "In construing provisions ... in which a general statement of policy is qualified by an exception," courts generally must "read the exception narrowly in order to preserve the primary operation of the provision." *Comm'r* v. *Clark*, 489 U.S. 726, 739 (1989); accord *Knight* v. *Comm'r*, 552 U.S. 181, 190 (2008) (same). The reason is simple: "[t]o extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people." *A.H. Phil-*

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[9] Unsurprisingly, therefore, the legislative history is replete with statements reflecting Congress's goal of "protect[ing] the privacy and safety of all Americans." 139 Cong. Rec. 29,467–68 (1993) (statement of Sen. Boxer); *see also id.* at 26,267 (statement of Sen. Warner) ("both personal privacy and personal safety are disappearing and this legislation would help to protect both"); *id.* at 29,470 (statement of Sen. Biden) ("Americans do not believe they should relinquish their legitimate expectations of privacy" over their personal information "simply by obtaining drivers' licenses or registering their cars"); *id.* at 29,468 (statement of Sen. Warner) ("There is a war in this country to fight for privacy. People are now fighting, and [the DPPA] is coming to their assistance to provide the privacy, which I and many others thought existed."); *id.* at 27,327 (statement of Rep. Moran) ("92 percent of Americans believe that the DMV should not sell or release personal data about them without their knowledge and approval.").

lips, Inc. v. *Walling*, 324 U.S. 490, 493 (1945); accord *Clark*, 489 U.S. at 739.

This principle applies with particular force to subsection (b)(4), because it is an exceptional exception. It is one of only four exceptions that authorize use of "highly restricted personal information" by private individuals. § 2721(a)(2).[10] As noted, "highly restricted personal information" is the subset of personal information comprising "an individual's photograph or image, social security number, [and] medical or disability information." § 2725(4).

The Fourth Circuit thus plainly erred in giving an "expansive sweep to the litigation exception." Pet. App. 30a. With respect to less sensitive personal information, Congress conditioned disclosure and use for bulk solicitation and other purposes on express consent, created narrow exceptions for private parties to use personal information without express consent, and placed additional restrictions on the resale or redisclosure of less sensitive information obtained without consent. See *supra*, Part II. In light of this scheme, and the DPPA's central purpose of protecting

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[10] The other three such exceptions, *see* § 2721(a)(2), are subsection (b)(1), which permits "use by any government agency ... in carrying out its functions, or any private person or entity acting on behalf of" a government agency, § 2721(b)(1); subsection (b)(9), which allows employers or their agents to verify "information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49," § 2721(b)(9); and subsection (b)(6), which permits use by insurers, insurance support organizations or self-insured entities "[f]or use ... in connection with claims investigation activities, antifraud activities, rating or underwriting," § 2721(b)(6). Another exception allows use by private investigators, but is entirely derivative of the foregoing exceptions. § 2721(b)(8) (permitting use "by any licensed private investigative agency or licensed security service for any purpose permitted by this subsection").

privacy and safety, it is implausible that Congress afforded lawyers access to *more sensitive* private information under an "expansive" provision that allows them to use social security numbers and medical and disability information to engage in mass solicitation without consent. The full text of the litigation exception confirms this was not Congress's intent.

2. The Full Text of the Litigation Exception Confirms that It Does Not Permit Use of Protected Information for Soliciting Clients.

The Fourth Circuit relied, uncritically, on the breadth of the phrase "in connection with," but that phrase "does not stand alone." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Rather, the litigation exception provides that uses of personal information are permitted when they are "in connection with [a judicial or administrative] proceeding ..., including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to" a court order. § 2721(b)(4). These express examples of permissible uses of protected information "in connection with" litigation underscore that the litigation exception permits use of DMV-derived information—including highly restricted personal information—to ensure the integrity and efficacy of adjudicative processes in which lawyers participate.

Under the familiar interpretive rule that "words and people are known by their companions," *Gutierrez* v. *Ada*, 528 U.S. 250, 255 (2000), phrases in a statute that are "capable of many meanings" are given a particular meaning or delimited by surrounding words in the statute, *Jarecki*, 367 U.S. at 307. For instance, general terms in a list are given a narrower or more definite meaning by looking to the more specific

terms in that list. See, *e.g.*, *Wash. State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384–85 (2003) (holding that the phrase "'other legal process' should be understood to be process much like the processes of execution, levy, attachment, and garnishment" listed in the statute). Likewise, broader words or phrases that are "surrounded" by specific terms or examples are given meaning or are narrowed according to those terms and examples. *Gutierrez*, 528 U.S. at 254–55 ("The reference to 'any election' is preceded by two references to gubernatorial election and followed by four."). This rule of construction also delimits general statutory phrases that are followed by a "nonexhaustive list." *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2287 (2010) (explaining that "use of the word 'include' can signal that the list that follows is meant to be illustrative rather than exhaustive," and holding that the "nonexhaustive list" following "include" limited the meaning of a general statutory term).

Here, the express examples Congress provided in the litigation exception involve "the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to" a court order. § 2721(b)(4). Each furthers the integrity of a judicial or administrative proceeding. That is, personal information and highly restricted information are used to further a necessary step in the judicial or administrative proceeding (*e.g.*, service of process, executing judgments, compliance with court orders), or to further the truth-seeking function of a court or agency (investigation in anticipation of litigation). All of these uses of DPPA-protected information aid the court or agency in reaching or enforcing a judgment.

Properly understood, the litigation exception may be used for a variety of purposes that further the ability of a court or agency to make or effectuate a decision in the proceeding: for example, it may be used to identify witnesses or other evidence; to identify absent class members to whom an opt-out notice must be sent; to track down the next of kin in a probate proceeding; or to locate a father who is delinquent on child support or alimony payments. Indeed, the very fact that subsection (b)(4) is one of only four exceptions that allow private use of highly restricted personal information underscores why Congress would link disclosure and use of such information to the integrity of judicial and agency proceedings.

By contrast, "solicitation by a lawyer of remunerative employment is a business transaction." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978) (addressing First Amendment challenge to restriction on in-person solicitation); see also *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 376 (1977) ("Advertising," including lawyer advertising, "is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange."). That is, lawyer solicitations merely "propose a commercial transaction." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) (First Amendment challenge to restrictions on soliciting business through newspaper advertisements). And, as this Court has recognized, "the business of getting clients" is separate from other aspects of the legal profession: "It is no less true than trite that lawyers must operate in a three-fold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes." *Cohen* v. *Hur-*

ley, 366 U.S. 117, 124 (1961), *overruled on other grounds*, *Spevack* v. *Klein*, 385 U.S. 511 (1967).

Accordingly, use of DMV information to solicit potential clients is not a use "in connection with" a judicial or administrative proceeding within the meaning of the DPPA because it does not further the integrity of a judicial or administrative proceeding. It is not necessary to a step in the judicial or administrative process, nor does it contribute to the truth-seeking function of that proceeding. Rather, it is merely the initiation of a proposed business transaction. Read as a whole and in the context of the entire statute of which it is a part, the litigation exception reflects no intent by Congress to grant trial lawyers a special dispensation not available to any other commercial actors to use DPPA-protected personal information and highly restricted personal information to solicit business.

3. Other Provisions, As Well As the Consequences of the Lower Court's Ruling, Confirm that the Litigation Exception Does Not Permit Solicitation of Clients.

The error of the Fourth Circuit's expansive interpretation of the phrase "in connection with" is confirmed by two other provisions that use the same phrase. It is also confirmed by the consequences of its expansive reading of the litigation exception itself.

Subsection (b)(6) creates an "insurer exception" that permits use of personal and highly restricted personal information "by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, *in connection with* claims investigation activities, anti-fraud activities, rating or underwriting." § 2721(b)(6) (emphasis

added). Thus, like the litigation exception, subsection (b)(6) uses the indeterminate phrase "in connection with." It is clear, however, that, in this provision, Congress did not intend that phrase to be given the sweeping scope the Fourth Circuit accorded the same phrase in subsection (b)(4).

Under subsection (b)(6), personal information may be disclosed for use "by any insurer ... in connection with ... underwriting." Underwriting, in turn, means to "insure on life or property." *Merriam-Webster's Collegiate Dictionary* 1289 (10th ed. 1993). Thus, under the Fourth Circuit's interpretation of "in connection with," this provision would authorize insurers to use DPPA-protected information to solicit customers without their consent, because underwriting—*i.e.* "insuring on life or property"—would be the ultimate "goal" of the solicitation. Pet. App. 41a–42a.

It is utterly implausible, however, to believe that, by using the words "in connection with," Congress intended to create a blanket exemption for the auto insurance industry from the DPPA's ban on the disclosure and use of personal information, and to grant this group of commercial entities access to private information—including highly restricted personal information—for use in soliciting customers. Indeed, as noted, one of the practices the DPPA sought to end was the sale of personal information by state DMVs, see, *e.g.*, *Condon*, 528 U.S. at 143–44, and one of the most natural purchasers of such information would be insurers seeking individuals who had just purchased a car requiring insurance, *id.* at 148. Thus, an expansive interpretation of "in connection with" in subsection (b)(6) would significantly undermine one of the Act's fundamental goals. See *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress "does not alter the fundamental details of a regulato-

ry scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Accordingly, the underwriter exception is properly read to permit disclosure and use by insurers only for underwriting activities akin to the other expressly identified activities, such as claims investigation and anti-fraud activities—*i.e.*, to verify information as part of "rating and underwriting."

Similarly, subsection (b)(10) permits use of personal information "*in connection with* the operation of private toll facilities." § 2721(b)(10) (emphasis added). Under the lower court's expansive view of the italicized phrase, the owner of a private toll road could obtain the addresses of the potentially thousands of motorists who purchased vehicles in the region served by that private road in order to send targeted mass mailings advertising the commuting benefits of the road. Such a reading of "in connection with" in this provision, therefore, would likewise undermine one of the Act's fundamental goals.

Nor are the anomalies that arise from the lower court's expansive reading of "in connection with" limited to other exceptions. Under its reading of the litigation exception, a lawyer who witnessed an auto accident and took down a driver's license plate number could obtain the driver's name and address from the state DMV to solicit the driver as a client. This activity would entail none of the benefits of "impact litigation," Pet. App. 38a, and would involve the type of "mer[e] 'trolling'" that the lower court apparently deemed objectionable, *id.* at 42a. Yet, this use is plainly permissible under the Fourth Circuit's expansive reading: such "solicitation of clients by trial lawyers is surely connected to litigation in that representation for a legal claim is the goal." *Id.* For all the reasons discussed above, however, it is implausible to

believe that, in enacting a provision that grants lawyers access to highly restricted personal information, Congress intended to afford them a unique opportunity, "as self-employed" professionals, *Cohen*, 366 U.S. at 124, to use protected information to propose commercial transactions.

Finally, a broad interpretation of the litigation exception increases the risk of undermining the DPPA's purpose of protecting individuals, particularly women, from threats, harassment and violence. One impetus behind passage of the Act was the murder of actress Rebecca Schaeffer outside her home by an individual who had obtained her address from DMV records. See 139 Cong. Rec. 29,466 (1993) (Statement of Sen. Boxer). To permit lawyers (or any other individual) to obtain tens of thousands of names and addresses increases the risk of inadvertent disclosure to those who might use the information to track down, threaten, and hurt individuals who have taken steps to hide their whereabouts from former abusive spouses or persons who have threatened them harm. See, *e.g.*, *Menghi* v. *Hart*, 745 F. Supp. 2d 89, 96–97 (E.D.N.Y. 2010) (police officer obtained plaintiff's personal information for a legitimate reason, then used it to harass and threaten her for years), *aff'd*, 478 F. App'x 716 (2d Cir. 2012). In this case, for example, the names and addresses of over 34,000 car buyers were filed with the South Carolina Office of Disciplinary Counsel, making those records available to the public. See CA4 JA 484. The fact that wholly inadvertent disclosures can result from otherwise permissible acquisitions is yet another factor counseling against the lower court's impermissibly broad interpretation of the litigation exception.

IV. THE FOURTH CIRCUIT'S "INEXTRICABLY INTERTWINED" RATIONALE IS LEGALLY AND FACTUALLY ERRONEOUS.

For the reasons given above, respondents' use of DPPA-protected personal information to solicit potential clients for a lawsuit was not authorized by either the solicitation exception or the litigation exception. The Fourth Circuit nevertheless held that respondents' solicitations are not actionable because they were "inextricably intertwined" with other conduct satisfying the litigation exception. Pet. App. 5a; see also *id.* at 23a, 29a, 37a–39a, 44a. That holding is wrong as a matter of both law and fact. The solicitation exception's express-consent requirement cannot be evaded on the ground that solicitation is "inextricably intertwined" with some other permissible use. Rather, if solicitation is necessary to a permissible use, express consent must be obtained. In any event, respondents' solicitations were not "inextricably intertwined" with any permissible use.

A. A Use Of Personal Information That Is "Inextricably Intertwined" With Bulk Solicitation Requires Express Consent.

The Fourth Circuit held that personal information may be used for bulk solicitation absent express consent if the solicitation is "inextricably intertwined" with other conduct satisfying the litigation exception. Pet. App. 5a. As discussed below, respondents' solicitations were not "inextricably intertwined" with any conduct permitted by the litigation exception. But even if they were, it would not change the fact that the DPPA requires express consent as a condition of using personal information for bulk solicitation.

The Fourth Circuit's "inextricably intertwined" test has no basis in the Act. Nothing in the DPPA permits

personal information to be used for bulk solicitation absent express consent if the solicitation is "inextricably intertwined" with conduct permitted by another exception. "'The Act contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permissible purpose.'" *Pichler* v. *UNITE*, 542 F.3d 380, 395 (3d Cir. 2008). Quite the contrary, the DPPA makes each "use not permitted under section 2721(b)" unlawful and the basis for a civil cause of action. § 2722(a) (making it unlawful to obtain or disclose personal information "for *any use not permitted* under section 2721(b)" (emphasis added)); § 2724(a) (creating a civil cause of action for uses of personal information "for *a purpose* not permitted under this chapter" (emphasis added)).

Moreover, as discussed above, the solicitation exception is the *exclusive* provision governing bulk solicitation, and its express-consent requirement cannot be evaded by relying on a more general authorization. Deeming solicitation "inextricably intertwined" with conduct permitted by another exception does not change this principle. The result in *RadLAX* would not have been different if selling the debtor's collateral free of the creditor's lien was necessary to provide the "indubitable equivalent" of the creditor's claims under the third exception; the plan still would have been subject to the second exception's credit-bidding requirement. See 132 S. Ct. at 2072 ("debtors may not sell their property free of liens ... without allowing lienholders to credit-bid"). Likewise here, personal information may not be used for bulk solicitation without complying with the solicitation exception's express-consent requirement. Thus, if bulk solicitation is necessary to conduct otherwise permitted by the DPPA, express consent must be obtained. The lowest common denominator, as it were, must govern.

At base, the Fourth Circuit's new "inextricably intertwined" exception violates the fundamental principle that courts "are not free to rewrite the statute that Congress has enacted." *Dodd* v. *United States*, 545 U.S. 353, 359 (2005). "'[When] the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Id.* (quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). The DPPA forbids the disclosure or use of personal information unless the particular use satisfies one of the Act's exceptions. As explained above, the solicitations here do not satisfy one of those exceptions, and that should be the end of the matter. Instead, the Fourth Circuit effectively rewrote subsection (b)(12) to permit use of DPPA-protected information for bulk solicitations "if the State has obtained the express consent of the person to whom such personal information pertains, *or if such solicitation is inextricably intertwined with non-solicitation activities authorized under subsection (b)(4)*." As this Court has explained previously, however, "it is for Congress, not for [courts], to create exceptions or qualifications at odds with [a statute's] plain terms." *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 490 (1947); see also *Dodd*, 545 U.S. at 359.

B. The Solicitations Were Not "Inextricably Intertwined" With Any Permissible Use.

Even if the solicitation exception's express-consent requirement could be evaded when solicitation is "inextricably intertwined" with some other permissible use, the judgment below should still be reversed because respondents' solicitations were not inextricably intertwined with any permissible use.

1. The court of appeals concluded that the solicitations were inextricably intertwined with respondents'

"investigation" in anticipation of the *Herron* litigation. Pet. App. 39a–40a. According to the court, respondents used the personal information they obtained from the DMV "'in determining whether to file a group action'" and "'to assist in identifying the highest volume dealers.'" *Id.* The court's reasoning does not withstand scrutiny, for two reasons.

First, respondents did not need to *solicit* anyone to achieve these purported investigative purposes. The FOIA requests themselves asked for the names of the dealers that sold the cars, App. 57, 67, so respondents did not need to send solicitation letters to identify the highest volume dealers. Indeed, respondents did not need to obtain the *buyers'* personal information at all to identify the highest volume dealers; the *dealers'* information would have sufficed.

Nor was it necessary to solicit anyone to determine whether the challenged practice was common enough to support a group action. Respondents could simply have asked the buyers where they bought their cars and whether they paid the challenged administrative fees. Instead, as the court of appeals recognized, respondents used the buyers' personal information to solicit them. Pet. App. 25a–29a. That *solicitation* was not *investigation* in anticipation of litigation; nor was it "integral to" any investigation. *Id.* at 29a.

Second, the evidence shows that respondents' *only* purpose in obtaining and using the personal information was to solicit potential clients, not to investigate in anticipation of litigation. The solicitation letters did not seek information about whether car buyers were charged administrative fees. Rather, as the court of appeals noted, they contained "boilerplate solicitation language," and made "[n]o mention" of any investigation. Pet. App. 28a. Petitioner Tanner attested without contradiction that when he called res-

pondent Harpootlian in response to the solicitation letter, "Harpootlian did not express any interest in finding out any facts about [Tanner's] interaction with the dealership" or "sugges[t] that they needed or were interested in [him] as a possible witness." App. 281–82. Instead he "made an aggressive sales pitch" in which "he tried to get [Tanner] to sign up as a client for a lawsuit." *Id.* at 281.

In addition, four of the six FOIA requests, and all of the solicitation letters, were sent *after* respondents filed the *Herron* lawsuit. Pet. App. 8a–9a. One of the two pre-*Herron* FOIA requests was submitted just four days before *Herron* was filed, App. 67, and the other requested information only about purchases in Spartanburg County, *id.* at 57, where no named plaintiff in *Herron* purchased a car, CA4 JA 222–23, 226, 230–31. Respondents acknowledged below that they did not use any personal information to contact car buyers until they sent the first solicitation letter, four months after they filed *Herron*. *Id.* at 520. And respondents submitted no sworn declarations attesting that they obtained and used the information for investigative purposes, but instead made only unsworn statements in their briefs.

In light of these undisputed facts, a reasonable jury could conclude that respondents obtained and used the car buyers' personal information solely to solicit potential clients and not for any investigative purpose. In all events, even if respondents obtained and used protected information for an initial investigation, their later solicitation of thousands of potential clients was a separate and distinct use of the buyers' personal information. That separate and distinct use violated the DPPA regardless of whether respondents had a permissible investigative purpose in obtaining the information, and regardless of whether respon-

dents also used the information for permissible investigative purposes.

The court of appeals thus erred in holding that respondents were entitled to summary judgment based on their purported use of the personal information for investigation in anticipation of *Herron*.

2. The courts below also concluded that the solicitations were inextricably intertwined with the "prosecution of" *Herron*, Pet. App. 39a, because they were necessary to respond to the dealers' motions to dismiss, *id.* at 72a–79a. According to the lower courts, respondents were not "merely 'trolling'" for clients when they sent the solicitation letters, *id.* at 42a, because they did so in order to "respond to potentially dispositive motions in a pending case," *id.* at 78a. This reasoning too is wrong and, if accepted, would permit lawyers to file lawsuits without plaintiffs and then obtain and use DPPA-protected personal information to solicit clients to maintain the suit.

The dealers' motions to dismiss in *Herron* were based on the named plaintiffs' lack of standing to sue dealers from whom they had not bought a car. CA4 JA 668–74. The *Herron* court held that the plaintiffs had standing to sue only the dealers with whom they had dealt and any coconspirators. App. 235. In an effort to prevent dismissal of the other dealers, respondents obtained car buyers' personal information from the DMV, sent them solicitation letters without their consent, and then moved to amend the complaint to add the additional plaintiffs they had recruited through their solicitations. CA4 JA 520–22.

Contrary to the Fourth Circuit's view, these solicitations were not "inextricably intertwined" with some other permissible use of DPPA-protected information. Instead, they were pure solicitations. In suing dealers

with whom their existing clients had never dealt, respondents were acting no differently than a lawyer who files a "placeholder" lawsuit without *any* plaintiff, then uses DPPA-protected information to solicit clients to maintain the suit. See *Wemhoff* v. *Dist. of Columbia*, 887 A.2d 1004, 1007 & nn.1–2 (D.C. 2005). The act of filing a lawsuit without an actual client is not a use (permissible or otherwise) of "personal information pursuant to the litigation exception." Pet. App. 29a. Thus, seeking DMV information to find a proper plaintiff to maintain that suit cannot be "inextricably intertwined" with a use of "personal information pursuant to the litigation exception." The result cannot be different when a lawyer files a suit on behalf of a client against a dealer from whom that client bought a car, and ten other dealers the client has no standing to sue.

The lower courts' contrary conclusion rests on an illogical distinction between lawyers who use DPPA-protected personal information to "troll" for clients before suing (which it apparently viewed as impermissible) and lawyers who sue without a proper plaintiff and then use DPPA-protected personal information to solicit clients in response to the defendant's motion to dismiss (which the lower court deemed permissible). Nothing in the Act supports this arbitrary distinction. In both situations, lawyers are improperly filing suits against named defendants, then using that impropriety as a bootstrap to justify use of DPPA-protected information to solicit clients, on the ground that the use is "in connection with"—or, under the Fourth Circuit's construct, "inextricably intertwined with"—an improperly instituted "proceeding." Such conduct does not immunize respondents from liability for their improper acquisition and use of personal information to solicit clients.

3. Finally, the court of appeals suggested that respondents' solicitations are not actionable because "the solicitation was entirely consistent with state law." Pet. App. 29a. That is irrelevant. Whether respondents complied with state ethical rules regarding lawyer solicitation has no bearing on whether they violated the DPPA. Nothing in South Carolina law required respondents to solicit car buyers, let alone authorized them to obtain and use the buyers' DPPA-protected personal information to do so.

Moreover, even if South Carolina law did authorize lawyers to obtain and use DPPA-protected personal information to solicit clients, it would not matter. Any such law would be preempted by the DPPA. Under the Supremacy Clause, state law cannot permit what federal law forbids. See, *e.g.*, *Mich. Canners & Freezers Ass'n* v. *Agric. Mktg. & Bargaining Bd.* 467 U.S. 461, 478 (1984). Indeed, the DPPA contains an exception for "any other use specifically authorized under the law of the State that holds the record," but only "if such use is related to the operation of a motor vehicle or public safety." § 2721(b)(14). Because respondents' use of the car buyers' personal information was not related to the operation of a motor vehicle or public safety, state law is irrelevant.

In all events, respondents' reliance on their supposed ethical obligations is groundless. Respondents contended below that, as group representatives in *Herron*, they had an ethical obligation to protect the interests of unnamed class members, and that as part of that obligation they had to solicit car buyers to prevent them from losing their claims. This argument fails for multiple reasons. Initially, given the *Herron* court's ruling that the named plaintiffs had standing to sue only the dealers with whom they had dealt, App. 235, the "group" that respondents represented

included only those individuals who had bought their cars from the same dealers as the named plaintiffs, *id.* at 248 (the "statute allows one aggrieved car purchaser to sue 'for the benefit of the whole,' including all persons hurt by the same Defendant's violations of the Dealers Act"); *id.* at 251 ("the named Plaintiffs [are] prosecuting these cases in a representative capacity on behalf of the group of purchasers who purchased vehicles from the same dealership"). As to car buyers who purchased from other dealers, no suit had been properly instituted on their behalf, and respondents therefore were not acting in any representative capacity.

But even if these other car buyers were somehow within the orbit of respondents' group representation, respondents still had no ethical duty to solicit them. Respondents never explained exactly how they believed their solicitations were necessary to prevent the unnamed car buyers from losing their claims. In fact, the motions to dismiss in *Herron* had no bearing on the claims of individuals who had bought their cars from the improperly named dealers. A judgment dismissing those dealers for lack of a proper plaintiff would not have been a ruling on the merits of the unnamed buyers' claims and thus would not have had any preclusive effect on those buyers. See *Berry* v. *McLeod*, 492 S.E.2d 794, 800 n.2 (S.C. Ct. App. 1997) (per curiam); *Griggs* v. *Griggs*, 51 S.E.2d 622, 626 (S.C. 1949). Moreover, because the group action proceeded without the procedural protections of a class action such as notice and an opportunity to opt out, see App. 251–52, the judgment could not constitutionally have extinguished the unnamed buyers' claims, see *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985) (due process requires notice and an opportunity to opt out).

Finally, even if respondents did have an ethical duty to solicit unnamed car buyers, that duty would not have given them license to violate the DPPA. Instead, like other lawyers for whom DMV databases provide no ready source of potential claimants, respondents would have had to discharge those duties through other means. Thus, they could have sought to identify the unnamed buyers through advertising. They could have sought to utilize the DPPA's waiver procedure. § 2721(d) (allowing DMVs to mail a copy of a request for information to the individuals whose information was requested and seek a waiver of their right to privacy). Alternatively, they could have sought to comply with South Carolina's rules for class actions and, following class certification, requested a court order for DMV information to provide class notice. Instead, respondents obtained, used, and disclosed petitioners' and thousands of other car buyers' protected personal information in order to solicit them, without their express consent. In so doing, they violated the DPPA.

CONCLUSION

For these reasons, the Court should reverse and remand.

Respectfully submitted,

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ADDENDUM

STATUTORY ADDENDUM

FEDERAL STATUTES

18 U.S.C. § 2721. Prohibition on release and use of certain personal information from State motor vehicle records

(a) In general.—A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

> **(1)** personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or
>
> **(2)** highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9): *Provided*, That subsection (a)(2) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.

(b) Permissible uses.—Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of mo-

tor vehicle manufacturers to carry out the pur-poses of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and, subject to subsection (a)(2), may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.

(12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) Resale or redisclosure.—An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b) (11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b) (11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

(d) Waiver procedures.—A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b),

may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

(e) Prohibition on conditions.—No State may condition or burden in any way the issuance of an individual's motor vehicle record as defined in 18 U.S.C. 2725(1) to obtain express consent. Nothing in this paragraph shall be construed to prohibit a State from charging an administrative fee for issuance of a motor vehicle record.

18 U.S.C. § 2722. Additional unlawful acts

(a) Procurement for unlawful purpose.—It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) False representation.—It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

18 U.S.C. § 2723. Penalties

(a) Criminal fine.—A person who knowingly violates this chapter shall be fined under this title.

(b) Violations by State department of motor vehicles.—Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more

than $5,000 a day for each day of substantial noncompliance.

18 U.S.C. § 2724. Civil action

(a) Cause of action.—A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) Remedies.—The court may award—

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

18 U.S.C. § 2725. Definitions

In this chapter—

(1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

(2) "person" means an individual, organization or entity, but does not include a State or agency thereof;

(3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identifi-

cation number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.[11]

(4) "highly restricted personal information" means an individual's photograph or image, social security number, medical or disability information; and

(5) "express consent" means consent in writing, including consent conveyed electronically that bears an electronic signature as defined in section 106(5) of Public Law 106-229.

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[11] So in original. The period probably should be replaced with a semicolon.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
DEC 10 2012
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No. 12-25

In the
Supreme Court of the United States

EDWARD F. MARACICH, *ET AL.*,

PETITIONERS,

v.

MICHAEL EUGENE SPEARS, *ET AL.*,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Did the Fourth Circuit properly interpret the Driver's Privacy Protection Act's "litigation exception" to hold that the exception applied where attorneys obtained, disclosed or used personal information in connection with imminent and/or pending litigation filed on behalf of their clients (for the clients' benefit and for the benefit of other injured members of the public), even if the attorneys' conduct could also be characterized as "solicitation"?

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INTRODUCTION

Respondents obtained and used information from a state department of motor vehicles database in connection with litigation. Those actions fall squarely within one of the 14 separate permissible-use provisions in the federal Driver's Privacy Protection Act ("DPPA"). That should be the end of this case. Nonetheless, petitioners contend that respondents' actions violated the DPPA because they also constituted solicitation, which is a separate permissible use but one that requires consent, which was not obtained. Petitioners invoke the specific-controls-the-general canon, but that effort fails at the outset because there is no sense in which the provision they invoke is any more specific than the litigation provision. One specifically covers solicitation, the other specifically covers litigation, and solicitation in connection with litigation appears to be covered by both. Such overlap is common in the DPPA. The statute's 14 permissible-use provisions contain substantial overlap with no indication that Congress intended them to be mutually exclusive or wanted certain provisions to trump others. To the contrary, when a particular use falls within two overlapping permissible-use provisions, that only underscores that Congress did not want federal law to criminalize such a use. The 14 permissible-use provisions also ensure that the DPPA does not impermissibly upset the federal-state balance or intrude on areas of traditional state concern. The DPPA is commerce power legislation designed to end a practice by which some States would sell private information to all comers with potentially tragic results. In addressing that problem, Congress left

alone core government functions and areas of traditional state regulation, such as insurance and the practice of law. Thus, both basic principles of statutory construction and respect for federalism require rejection of petitioners' effort to ignore the clear application of the DPPA's litigation provision.

STATEMENT OF THE CASE

A. The Driver's Privacy Protection Act

Congress enacted the DPPA for an important, but limited, purpose: to "close a loophole in State law that allow[ed] anyone, for any reason, to gain access to personal information" by purchasing it from a state department of motor vehicles ("DMV"). 140 Cong. Rec. 7,924 (1994) (Rep. Moran). The Act was largely prompted by the tragic murder of actress Rebecca Schaeffer by an obsessed fan who obtained her address by purchasing it from the California DMV. To prevent States from allowing would-be criminals and "stalkers to obtain—on demand—private, personal information about their potential victims," 139 Cong. Rec. 29,470 (1993) (Sen. Biden), "[t]he DPPA establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent." *Reno v. Condon*, 528 U.S. 141, 144 (2000). The purpose of the Act is "simple and straightforward": Congress "want[ed] to stop stalkers from obtaining the name and address of their prey before another tragedy occurs." 140 Cong. Rec. 7,929 (Rep. Goss).

Because the DPPA is a federal intrusion on how States disclose information contained in the States' own databases, Congress was particularly cognizant

of the need to limit the scope of its regulatory reach. Congress thus carefully crafted the DPPA to ensure that while it would prevent disclosure of information to those without legitimate need for it, it would leave to the States many questions about the extent of disclosure to those with valid needs for the information. To that end, the statute does not prohibit all disclosure of information, but rather makes it unlawful only for a State to "knowingly disclose or otherwise make available" information from its DMV database "except as provided in subsection (b)" of the statute. 18 U.S.C. § 2721(a). Subsection (b) then delineates 14 broad categories of "permissible uses" as to which States retain their traditional discretion to determine whether and how to disclose information.

By design, those permissible-use provisions substantially overlap. For instance, one provision permits disclosure "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." § 2721(b)(1). But many of those same actors and activities are also covered by a separate provision permitting disclosure

> [f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of

> judgments and orders, or pursuant to an order of a Federal, State, or local court.

§ 2721(b)(4). Any disclosure that occurred in the course of litigation in this Court would clearly appear to come within both subsections. In the same vein, the statute permits disclosure for "research activities" subject to limitations, § 2721(b)(5), and "[f]or bulk distribution for surveys, marketing or solicitations" with consent, § 2721(b)(12). But it also permits disclosure for use in "motor vehicle research activities, including survey research," without those caveats. § 2721(b)(2).

The DPPA not only prohibits disclosure by state DMVs for uses not permitted, but also makes it unlawful for individuals "knowingly to obtain or disclose personal information ... for any use not permitted under section 2721(b)." § 2722(a). The same 14 permissible-use provisions apply in both situations. The DPPA also makes it unlawful "to make false representation to obtain any personal information from" a DMV record. § 2722(b). "A person who knowingly violates" the DPPA is subject to a criminal fine, § 2723(a), and anyone whose information is obtained or disclosed "for a purpose not permitted" by the statute may sue for "actual damages, but not less than liquidated damages in the amount of $2,500," and punitive damages "upon proof of willful or reckless disregard of the law." § 2724. Although States are exempt from that private cause of action, § 2725(2), the Act authorizes civil penalties of up to $5,000 per day against any state DMV with "a policy or practice of substantial noncompliance with" any of its provisions. § 2723(b).

As the DPPA's sponsors reiterated throughout its consideration and enactment, the expansive permissible-use provisions are essential to ensuring that the statute "strikes a critical balance between an individual's fundamental right to privacy and safety and the legitimate governmental and business needs for this information." 140 Cong. Rec. 7,925 (Rep. Moran); *see also* 139 Cong. Rec. 29,470 (Sen. Harkin); 139 Cong. Rec. 29,468 (Sen. Boxer). They are also essential to the balance between federal and state regulation Congress sought to achieve. By neither prohibiting nor requiring States to disclose information in situations covered by the 14 permissible-use categories, the statute leaves States with significant flexibility to design more privacy-protective regimes should they choose to do so, or to restrict uses of information through other mechanisms, like direct regulation of the businesses or professionals to whom it is disclosed. Finally, the permissible-use provisions are essential to ensuring that the DPPA regulates commercial activity in the heartland of Congress' commerce power, rather than interfering with activities that do not implicate commerce but do intrude into areas of traditional state authority. *See Condon*, 528 U.S. at 148 (affirming constitutionality of DPPA as a regulation of "the sale or release of [personal] information in interstate commerce").

In striking that critical balance, Congress paid careful attention to the DPPA's litigation provision. Because that provision deals with the circumstances under which attorneys may access the States' DMV databases, it addresses matters at the core of the States' "especially great" interest in regulating

members of the legal profession, who "are essential to the primary governmental function of administering justice." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). Early iterations of the litigation provision were considerably narrower than the final version. For example, one version would have permitted disclosure only "[f]or the use in any civil or criminal proceeding in any Federal, State, or local court, if such proceeding involves a motor vehicle," S. 1589, 103d Cong.; a slightly broader version allowed disclosure "[f]or use in any civil or criminal proceeding in any Federal or State court," H.R. 3365, 103d Cong.

The provision ultimately was expanded to allow disclosure for use "in connection with" a much wider range of proceedings and to make clear that information could be disclosed for, among other things, "investigation in anticipation of litigation." § 2721(b)(4). When introducing the bill containing that final version of the litigation provision, its sponsor emphasized that the revised legislation was "very different" from earlier versions and gave "more flexibility to the States in allowing additional uses of personal information." 140 Cong. Rec. 7,925 (Rep. Moran). He further reiterated that those revisions would ensure that "insurance companies, law enforcement professionals, attorneys, and all other authorized users would continue to have access to this information." *Id.*

Since the DPPA's enactment, Congress has underscored both the importance of the litigation provision and its desire to leave all matters falling within it to the discretion of the States. One year

after Congress amended subsection (b)(12) from an opt-out to an opt-in provision, *see Condon*, 528 U.S. at 144, it further amended the statute to draw a distinction between standard contact information and what it labeled "highly restricted personal information"—namely, photographs or images, social security numbers, and medical or disability information, § 2725(4). Pub. L. No. 106-346, 114 Stat. 11356 (2000). When Congress did so, it made the litigation provision one of only four provisions under which States have the option to disclose that highly restricted information. § 2721(a)(2).

B. The *Herron* Litigation

South Carolina's Manufacturers, Distributors, and Dealers Act ("MDDA") prohibits motor vehicle dealers from engaging "in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public." S.C. Code § 56-15-40. Anyone injured by a violation of the MDDA may sue for damages. § 56-15-110. The MDDA also provides that when an action "is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole." § 56-15-110(2). That representative action provision allows an individual to bring a private attorney general suit akin to a class action, albeit with fewer procedural constraints.

Respondents are state-licensed attorneys who practice law in South Carolina. In June 2006, they were approached by several consumers who complained that certain car dealers were charging unlawful administrative fees. By its nature, such

conduct tends to succeed only when done in concert with other dealers, lest consumers simply take their business elsewhere. The attorneys thus began investigating whether the practice was widespread and determined that it appeared to be occurring statewide. Accordingly, respondents sought additional information to determine whether the lawsuit they anticipated filing would be "one of common or general interest to many persons" under the MDDA's representative action provision.

To that end, on June 23, 2006, one of the respondents sent a Freedom of Information Act ("FOIA") request to the South Carolina DMV. The letter informed: "I have plaintiffs who have complained of certain conduct as a result of their transactions with car dealers, conduct which I believe to be a potential violation of state law. I am attempting to determine if this is common practice, and am accordingly submitting this FOIA request." JA57. It further stated that the request was made "in anticipation of litigation ... pursuant to ... 18 U.S.C § 2721(b)(4) of the [DPPA]." JA57. The letter requested information regarding "[p]rivate purchases of new or used automobiles in Spartanburg County during the week of May 1-7, 2006, including the name, address, and telephone number of the buyer, dealership where purchased, type of vehicle purchased, and date of purchase." JA57. The DMV provided the information.

On August 24, 2006, respondents sent a second FOIA request, which also stated that it was made "in anticipation of litigation ... pursuant to ... 18 U.S.C. § 2721(b)(4)." JA67. The letter sought the same

information for car purchases in five additional counties during the same week. JA67. Five days later, respondents filed suit on behalf of four consumers who originally contacted them about the illegal fees, naming 51 dealers as defendants. Dist.Ct.Doc.77-2. Because respondents' investigation had revealed that the deceptive practices appeared widespread, the four named plaintiffs invoked the MDDA's representative action provision to assert their claims "for the benefit of all South Carolina car buyers who[] paid administrative fees" to the dealer/defendants during the same time frame, and also alleged various conspiracy claims. *Id.* at 14. Respondents did not contact any of the purchasers the DMV disclosed before filing their complaint or indeed for several months afterwards.

Between September 2006 and February 27, 2007, various dealer/defendants filed more than 180 motions to dismiss. One of the central arguments in those motions was that the plaintiffs lacked standing to pursue their representative action against dealers from whom they did not personally purchase cars. *See, e.g.*, JA144-69. In the dealers' view, every dealer for whom there was not a corresponding purchaser named as a plaintiff should be dismissed. Respondents disagreed, as, in their view, the group action provision permitted the named plaintiffs and respondents to represent the interests of all similarly situated individuals. But they worried that the state trial court might accept the defendants' theory. Accordingly, respondents endeavored to add a purchaser/plaintiff corresponding to each dealer/defendant named in the *Herron* complaint.

To locate those additional plaintiffs, respondents sent a third FOIA request to the DMV on October 26, 2006. That request, which was also made pursuant "the exception in 18 U.S.C. § 2721(b)(4)," sought information concerning vehicle sales from May 1-14, 2006, by specific dealers seeking dismissal to the members of the public respondents believed they were already representing in the MDDA representative action. JA69-82. While that request was pending, on October 31, 2006, respondents also amended the complaint to add four more plaintiffs who had contacted respondents on their own initiative, and approximately 250 more dealer/defendants. JA114-19.

In early January 2007, more than four months after they filed the *Herron* litigation, respondents began reaching out to the purchasers disclosed by the DMV to determine whether they, too, had been charged illegal fees and were interested in participating in the lawsuit. Respondents sent each individual a letter informing:

> We represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee." We believe that these fees are being charged in violation of South Carolina law.
>
> We understand that you may have been charged one of these fees on your recent purchase of an automobile. We obtained this information in response to a Freedom of

> Information Act request to the South Carolina Department of Motor Vehicles.
>
> The exact nature of your legal situation will depend on facts not known at this time. You should understand that the advice and information in this communication is general and that your own situation may vary. However, we would like the opportunity [to] discuss your rights and options with you in a free consultation. If you are interested in participating in the case or in a free consultation, please mail the enclosed postage paid card and we will contact you soon.

JA91-92 (emphasis omitted). To ensure that their efforts would comply with South Carolina's Rules of Professional Conduct, respondents labeled the letters "ADVERTISING MATERIAL" and included all statements required for written communication with prospective clients. JA91; *see* S.C. R. Prof. Conduct 7.3. In accordance with the version of Rule 7.3(c) then in effect, respondents also filed a representative copy, along with a list of recipients, with the South Carolina Supreme Court's Office of Disciplinary Counsel. JA89.

Over the next few months, respondents made a series of similar FOIA requests, each stating that it was made pursuant to "the exception in 18 U.S.C. § 2721(b)(4)" and each seeking information relating to purchases from specific dealers actively seeking dismissal from the ongoing litigation. The DMV responded to each request by providing the

information, and respondents sent a series of nearly identical letters to the purchasers the DMV disclosed.

On March 9, 2007, the plaintiffs responded to the dealers' motions to dismiss by arguing that they had standing to pursue the suit against all dealers "for the benefit of the whole" because, *inter alia*, the MDDA's representative action provision authorized such a suit, and because their own personal injuries had resulted from the dealers' conspiracy to each charge the same illegal fees. Dist.Ct.Doc.77-12–15. The court held a hearing on the motions on April 4, 2007, but deferred ruling. Dist.Ct.Doc.78-1. Accordingly, respondents moved forward with their plan to add a purchaser/plaintiff for each dealer/defendant, thereby eliminating any potential standing concern. To that end, in June 2007, the plaintiffs moved to amend the complaint to name 247 additional plaintiffs identified through respondents' outreach. JA179-88. Several dealers opposed the motion, arguing that joining new plaintiffs would be improper and prejudicial. JA189-210. In addition, they argued that respondents had violated the DPPA by obtaining the new plaintiffs' contact information from the DMV and sending them "solicitation" letters. JA193-96.

While the motion to amend remained pending, the trial court denied the dealers' motions to dismiss, ruling that the eight original plaintiffs had made sufficient allegations of standing to survive a motion to dismiss and continue representing the public at large. JA211-13. The same day, the trial court heard arguments on the motion to amend. During the hearing, the dealers' counsel acknowledged that the

FOIA requests and subsequent letters were sent "to try to satisfy an issue of standing that was raised by [defense] counsel," but argued that they violated the DPPA nonetheless because they also involved solicitation of prospective clients. JA224. During the same hearing, the trial court itself observed that respondents' actions were taken to "rectify" or "remedy" the court's own expressed "concern" about standing, an issue that the court repeatedly noted it did not intend to finally resolve until after discovery. Dist.Ct.Doc.78-9 ("Hrg.") 48; *id.* at 50 ("if you go forward with eight people you've still got the standing issue that we've still got to deal with somewhere down the road"). In a subsequent order noting that "Plaintiffs seek to add the 246 parties in order to address the standing issue raised by Defendants in their Motions to Dismiss," the trial court ultimately denied the motion to amend on grounds that, *inter alia*, state procedural rules did not allow it. JA228-29.

Because the trial court had made clear that the standing issue remained unresolved, respondents decided to moot it by filing two new lawsuits on behalf of the 247 other purchasers in September 2007. Pet.App.14a. Those cases were consolidated with *Herron*, and defendants as to whom there was no corresponding named plaintiff in the original *Herron* case were then voluntarily dismissed from that case on January 31, 2008. JA234-35. When granting those voluntary dismissals, the trial court reconsidered and partially reversed its earlier standing ruling. The court now held that "a named Plaintiff does not have standing to sue, on behalf of himself or others, any Defendant with which he did

not transact any business" unless the plaintiff alleges a conspiracy involving "the Defendant from which the named Plaintiff purchased a vehicle." JA235. Nonetheless, the court subsequently confirmed that respondents, "as private attorneys general, from the inception of this litigation have represented the public interest ... and therefore represent all those affected by such practices." JA253-54.

Because the new lawsuits effectively mooted the standing issue, all three cases then proceeded on the merits, and the trial court ultimately found that the dealers had violated the MDDA. JA261-76. Consistent with the broad scope of the representation respondents undertook, subsequent settlements have resulted in monetary relief to approximately 30,000 purchasers.

C. The Instant Litigation

After their efforts to stymie the MDDA litigation failed, the dealers' attorneys decided to try a different tack. On June 23, 2009, one of the same attorneys who represented the dealers in the still-pending *Herron* case filed a putative class action against respondents in federal court, seeking to represent a class composed largely of the same purchasers whose interests respondents were representing in the ongoing state court litigation.[1] The complaint

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[1] That attorney eventually withdrew from this case after respondents pointed out the obvious conflict that arose from his attempt to represent individuals in this case who were also plaintiffs in the *Herron* case, where he continued to represent some of the dealer defendants. Dist.Ct.Doc.80.

rehashed the same theory the attorney had pressed in state court, that respondents violated the DPPA by obtaining the purchasers' information from the South Carolina DMV and using it to contact them "for the statutorily prohibited purpose of mailing lawyer advertising and solicitation materials." JA36. The complaint sought $2,500 in liquidated damages for each instance in which each individual's information was obtained, disclosed, or used—a request totaling more than $200 million—and punitive damages as well. JA55.

Respondents moved to dismiss, arguing that petitioners failed to state a claim under the DPPA because respondents' FOIA requests and subsequent letters were for the permissible purpose of "use in connection with [a] civil ... proceeding," "including ... investigation in anticipation of litigation." 18 U.S.C. § 2721(b)(4). Respondents also argued that the information was obtained and used for the permissible purpose of "use by ... any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions," § 2721(b)(1), because respondents were acting as private attorneys general, pursuant to the MDDA. Relatedly, they agued that in the context of the *Herron* litigation, their conduct was not solicitation because they in fact were contacting individuals they were already representing as part of the group action. The District Court denied the motion, concluding that "the factual allegations in the complaint [we]re sufficient to satisfy the low bar for pleading a claim for relief." Pet.App.96a.

The case proceeded to summary judgment, and at that point, the District Court granted judgment in respondents' favor. The court first concluded that respondents "did not solicit the unnamed Car Buyers as a matter of law" because respondents already had an attorney-client relationship with, or at least a fiduciary duty to, those individuals under state law by virtue of the fact that the *Herron* litigation was proceeding "'for the benefit of the whole.'" Pet.App.61a (quoting S.C. Code § 56-15-110(2)). The court went on to hold that "even if the Defendants' actions constituted solicitation, as long as the Defendants had a permissible use for the information, there [wa]s no DPPA violation." Pet.App.75a-76a. Finding "no question that the Defendants utilized the information they obtained for use in the *Herron* litigation," the court concluded that their conduct was for the "permissible purpose" of "the litigation exception." Pet.App.78a. The court also concluded that because they acted pursuant to their state law authority as private attorneys general, their actions also satisfied subsection (b)(1). Pet.App.79a-81a.

Petitioners appealed, and the Court of Appeals affirmed. Although the court disagreed with the District Court's conclusion that respondents "did not engage in solicitation," it concluded that they "indisputably made permissible use of the" information "for use 'in connection with [litigation],' including 'investigation in anticipation of litigation.'" Pet.App.5a (quoting 18 U.S.C. § 2721(b)(4)). Following the Eleventh Circuit's lead in *Rine v. Imagitas, Inc.*, 590 F.3d 1215 (2009), the court deemed the case governed by the principle that "where two provisions overlap but 'both apply to

situations not governed by the other,' they 'both must be given effect unless they pose an either-or proposition,'" which the DPPA's permissible-use provisions do not. Pet.App.34a (quoting *Rine*, 590 F.3d at 1226). As for petitioners' reliance on the specific-controls-the-general canon, the court found that canon irrelevant because "the DPPA provisions are equally specific." *Id.*

Finding that respondents "always had only one use as their purpose, i.e., litigation, litigation that at all times of their conduct was either imminent or ongoing," and that their "satisfaction of the state solicitation requirements was inextricably intertwined with their intended permitted use of the personal information they obtained," the court concluded "that full effect should be given to the permissive uses protected by the litigation exception." Pet.App.37a-38a. "Put simply," the court explained, respondents "did what any good lawyer would have done; Congress could not possibly have intended to impose DPPA liability under such circumstances." Pet.App.38a. Given its holding that respondents satisfied the litigation provision, the court did not address the District Court's alternative ruling that they satisfied subsection (b)(1) as well. Pet.App.23a n.9.

SUMMARY OF ARGUMENT

The DPPA expressly permits disclosure of personal information for, *inter alia*, use "in connection with [a] civil ... proceeding," including "investigation in anticipation of litigation." That litigation provision and the other 13 permissible-use provisions are the key to ensuring that the DPPA

remains a modest and permissible regulation of commerce, rather than a problematic federal intrusion into local government functions and areas of traditional state concern. If a use is prohibited by the DPPA, any contrary state law is preempted and substantial civil and criminal penalties apply. If a use comes within a permissible-use provision, by contrast, States may still limit disclosure or regulate permissible users via industry-specific rules or standards of professional conduct.

There can be no serious dispute that respondents' actions were in connection with a civil proceeding, as they were all taken for specific purposes directly related to the *Herron* litigation, which was either ongoing or imminent at all relevant times. Rather than contend otherwise, petitioners insist that whether respondents satisfied the litigation provision is entirely beside the point because they did not simultaneously satisfy the DPPA's separate provision permitting bulk distribution of personal information for solicitation with express consent. That contention cannot withstand scrutiny.

The bulk distribution provision is not a prohibition or limitation on the circumstances in which information from DMV databases may be disclosed. To the contrary, it is a permissive provision, permitting disclosure of such information for "bulk distribution for surveys, marketing or solicitation" with express consent. Petitioners nonetheless maintain that this permissive provision operates as an implicit prohibition on any solicitation without express consent, without regard to whether it simultaneously satisfies one of the 13 other

permissible-use provisions, because the "bulk distribution" provision specifically addresses solicitation and the specific governs the general. That argument fails at the outset because the bulk distribution provision is no more specific than the litigation provision or any of the other permissible-use provisions. While the bulk distribution provision specifically addresses, *inter alia*, solicitation, the litigation provision specifically addresses use in connection with litigation, and there is no indication that the two are mutually exclusive. Thus, a use for solicitation in connection with litigation is potentially covered by two overlapping permissible-use provisions, albeit with slightly different conditions and limitations. In that situation, the use is permissible as long as it satisfies either one of the two potentially applicable provisions. There is no basis for an inference that one provision is more specific than the other or that either provision was meant to exclude the other. Indeed, the structure of the DPPA strongly supports this conclusion, as numerous permissive-use provisions overlap, and the statute provides courts with no tools to determine which ones are more specific or intended to trump others.

Petitioners also ignore canons against reading federal statutes to upset the federal-state balance or intrude on matters of traditional state authority. Congress knew that any federal regulation of state-created databases had to be sensitive to federalism concerns. Giving the permissible-use provisions their full, natural scope is critical to ensuring that the DPPA addresses core federal concerns while leaving the States with substantial discretion whether to authorize disclosure in areas of traditional state

authority, such as government functions, insurance regulation, or the practice of law. Petitioners would convert the bulk distribution provision into a tool of direct federal interference with States' traditional regulatory authority over attorney solicitation, and even into a mechanism for forcing attorneys to choose between violating state ethics rules or the DPPA. Nothing in the statute comes close to providing the requisite clear statement that Congress intended the bulk distribution provision—a provision *permitting* disclosure of information in certain circumstances—to upset the federal-state balance in that manner, or to impose the kind of extreme preemption even of state ethical obligations that petitioners envision. Simply put, such a further extension of federal authority over both state databases and the States' regulation of the legal profession—in the face of a permissible-use provision that allows use "in connection with" litigation—must rest on a clearer indication of congressional intent than the specific-controls-the-general canon could provide, even were it otherwise applicable. That is even more true in light of the substantial civil and criminal penalties applicable to a DPPA violation.

Petitioners alternatively contend that even if the bulk distribution provision does not prohibit disclosure for solicitation in connection with litigation without express consent, the litigation provision should be construed narrowly to exclude it. That argument fails for largely the same reasons that petitioners' specific-controls-the-general argument does. The DPPA's permissible-use provisions must be construed broadly because they are, in the first instance, limitations on direct federal regulation of

States—limitations Congress carefully constructed to avoid sensitive constitutional concerns. Moreover, the text of the litigation provision and the expansive terminology Congress employed refutes any contention that it is the sort of narrow provision petitioners suggest. Indeed, if any provision is to be construed narrowly to avoid any overlap between the litigation and bulk distribution provisions, it is "solicitation," which certainly need not extend to communications between attorneys and individuals in circumstances where state law already recognizes an attorney-client relationship.

Petitioners make the mistake of viewing the DPPA in a vacuum, but just because a use of information falls within one of the permissible-use provisions does not mean that the use is necessarily lawful. States remain free to impose their own limits on disclosure or to regulate the use of information by state-regulated professionals. Here, South Carolina created a cause of action that made certain DMV information useful "in connection with" litigation. The state DMV then released that information, and a state court observed that the information was relevant to defenses raised by defendants in the state-court civil proceeding. To conclude that all of that violated a federal statute that permits disclosure and use of such information in connection with litigation based on an inference from another *permissible*-use provision is simply not tenable. A congressional statute designed to address a discrete federal problem while minimizing federal intrusion into a State's management of its own database through a series of 14 overlapping permissible-use

provisions cannot be interpreted to have such an intrusive effect.

ARGUMENT

I. Respondents Readily Satisfied The DPPA's Litigation Provision, Which Is Not Trumped By The DPPA's Bulk Distribution Provision.

A. Respondents' Conduct Falls Squarely Within the DPPA's Provision Allowing Use "In Connection With" Litigation.

There can be no serious dispute that the information at issue in this case was disclosed and used "in connection with [a] civil ... proceeding," § 2721(b)(4)—namely, the *Herron* litigation, which was either imminent or pending at all times. Respondents made the first two county-specific FOIA requests, five days and two months respectively before they filed the *Herron* complaint, to obtain information about the scope of the unfair practices that formed the basis for the complaint. JA57. Those requests did not result in solicitation of any kind; they were quite clearly for investigatory purposes and thus do not even implicate the question presented. Respondents made the subsequent FOIA requests to identify other individuals who had been charged the same unlawful fees as the plaintiffs they were representing. And they reached out to the individuals whose information the DMV provided to address a specific concern the dealers and the court had raised about whether their existing clients' claims could proceed against certain defendants.

Petitioners' own former counsel acknowledged the direct connection between respondents' actions

and the *Herron* litigation while representing some of the dealers in *Herron*. As he pointed out when first raising the DPPA issue before the *Herron* trial court (a telling fact in and of itself), all the letters were sent "to try to satisfy an issue of standing that was raised by" the dealers. JA224. The trial court also acknowledged that respondents reached out to other purchasers because they were attempting to add plaintiffs to the *Herron* complaint to "rectify" or "remedy" the court's own "concern" that respondents would need to find a plaintiff/purchaser for each dealer/defendant. Hrg. 48. Respondents sent every single one of the letters to individuals in the seven-month period during which the trial court repeatedly reiterated that standing remained a live issue and sent none after the court decided that it would not allow additional plaintiffs.

Applying the plain text of the DPPA's litigation provision to those undisputed facts, the applicability of the litigation provision is not even a close call. Respondents were not acting in connection with or anticipation of litigation in some vague, attenuated sense. They obtained and used personal information to further specific investigatory needs for existing clients in anticipation of a state court lawsuit they promptly commenced and in direct response to concerns raised by the defendants and the court during that pending case. Whatever the outer bounds of conduct "in connection with" a civil proceeding may be, obtaining personal information to identify and contact similarly situated individuals in furtherance of the interests of existing clients in imminent or pending litigation—especially a representative action—does not begin to approach them.

B. The Bulk Distribution Provision Does Not Trump the Litigation Provision.

Petitioners nonetheless insist respondents should be held liable for hundreds of millions of dollars in damages because respondents did not also satisfy the DPPA's separate provision permitting disclosure of personal information "[f]or bulk distribution for surveys, marketing or solicitations" with express consent. § 2721(b)(12). In their view, that provision trumps the other 13 permissible-use provisions under the canon of construction that "the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). That contention lacks merit. Like all canons, "the general/specific canon is not an absolute rule." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2072 (2012). It is "simply [a] 'rule[] of thumb' which will sometimes 'help courts determine the meaning of legislation,'" *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996), and "can be overcome by textual indications that point in the other direction." *RadLAX*, 132 S. Ct. at 2072. Here, there is no reason to resort to the canon at all because the text, structure, and purpose of the DPPA all confirm that the various permissible-use provisions are purposefully overlapping, such that no one provision is more specific than—or otherwise implicitly trumps—the others. In short, if disclosure and use comes within any one of the DPPA's 14 permissible-use provisions, the analysis is at an end. The use certainly does not become problematic because another provision also is potentially relevant. Once one permissible-use provision is satisfied, there is no need to inquire whether another is as well.

1. The DPPA's permissible-use provisions are equally specific and not mutually exclusive, and thus reliance on the specific-controls-the-general canon is misplaced.

At the outset, the text of the DPPA lends no support to petitioners' argument that the bulk distribution provision trumps the statute's other permissible-use provisions. The bulk distribution provision is not a "flat prohibition on nonconsensual bulk solicitation." Pet'rs' Opening Br. ("Br.") 32. Indeed, it is not a prohibition at all. Rather, it is one of 14 provisions setting forth circumstances under which disclosure is *permitted*, satisfaction of any one of which precludes DPPA liability. The basic structure of the statute confirms as much, as the statute prohibits disclosure only when it is not for a permissible use. *See* § 2722(a) (prohibiting persons from obtaining or disclosing information "for any use not permitted under section 2721(b)"); § 2721(a)(1) (prohibiting DMVs from disclosing information "except as provided in subsection (b)"). If a use is permitted by any subsection of section 2721(b), then the statutory prohibition is not satisfied. The bulk distribution provision offers one avenue to demonstrating a permissible use, but so, too, does the litigation provision, the government functions provision, and every other permissible-use provision the statute enumerates.

Petitioners maintain the bulk distribution provision nonetheless implicitly prohibits any solicitation without consent that the other permissible-use provisions permit because it is a

"specific" provision and "the specific governs the general." *Morales*, 504 U.S. at 384. The fatal flaw in that logic is readily apparent: The bulk distribution provision is no more specific than the litigation provision or any other provision. The bulk solicitation provision specifically addresses, *inter alia*, solicitation. But the litigation provision just as specifically addresses use in connection with litigation. And nothing in the statute explicitly or implicitly suggests one should trump the other when it comes to solicitation in connection with litigation. Subsection (b)(4) is not a "general" or "catchall" provision that kicks in only when none of the statute's more "specific" provisions applies. It is a specific provision that governs in a context where others may not—namely, when personal information is sought and used in connection with litigation. To be sure, the litigation provision does not address solicitation, a subject that the bulk distribution provision "specifically" does. Br.28. But the bulk distribution provision does not address litigation, a subject that the litigation provision "specifically" does. Thus, while petitioners blithely declare this a solicitation case that must be governed exclusively by the bulk distribution provision, respondents could just as easily declare it a litigation case that must be governed exclusively by the litigation provision.

Petitioners' resort to the specific-controls-the-general canon thus fails at the outset because subsection (b)(12) is no more specific or general than subsection (b)(4). But that canon is inapplicable for the further reason that nothing in the text or structure of section 2721(b) suggests the permissible-use provisions were intended to be mutually

exclusive, with each uniquely occupying its own exclusive field. To the contrary, the substantial overlap among the various provisions refutes any suggestion that any one subsection was intended to govern exclusively any particular field.

For example, subsection (b)(1) broadly permits disclosure "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions." § 2721(b)(1). Government agencies routinely engage in many of the activities covered by section 2721(b)'s other permissible-use provisions, such as "matters of motor vehicle or driver safety and theft," (b)(2); "research activities," (b)(5); "providing notice to the owners of towed or impounded vehicles," (b)(7); and, of course, activities "in connection with" litigation, (b)(4). If conduct falls within the overlap of two permissible-use provisions—such as if this Court were to include some information in its opinion in this case (which would seem obviously covered by both subsection (b)(1) and subsection (b)(4))—the logical inference is that Congress was particularly anxious not to prohibit such use and that such use is permitted by one or both provisions. There is no need to consider which provision is more specific or general—and no tools available to the judiciary for making such a determination—because one provision is enough. In other words, a use that falls within two permissible-use provisions is an easy case, and there is no need to accept petitioners' invitation to make it a hard one.

To be sure, there are circumstances where a use comes within the ambit of two different permissible-use provisions but ultimately satisfies only one of

them. But there is no reason to assume that the restrictions from one provision are somehow transferred to the other just because the use falls within the overlap of two potentially applicable provisions. For example, only a few provisions allow access to more restricted information. In the case of a use that comes within the potential ambit of two provisions, only one of which allows use of more sensitive information, it would make no sense to suggest that the sensitive information could not be disclosed. Likewise, if a use falls within two provisions, only one of which allows use without consent, there is no reason to transfer the consent requirement from one provision to the other. But that is precisely what petitioners seek to do.

Notwithstanding the substantial overlap among the various permissible-use provisions, petitioners seek to have the bulk distribution provision occupy its field to the exclusion of all other subsections. But the plain text of the statute conclusively refutes the notion that subsection (b)(12) is intended to cover the entire universe of "surveys, marketing or solicitations," as another permissible-use provision *explicitly* permits a subset of such activities without express consent. Among the many disclosures "[f]or use in connection with matters of motor vehicle or driver safety" that subsection (b)(2) permits without consent is disclosure for "motor vehicle market research activities, *including survey research*." § 2721(b)(2) (emphasis added). As that provision illustrates, the DPPA necessarily contemplates circumstances in which subsection (b)(12) is the more general provision, covering disclosure for "surveys, marketing or solicitations" generally, while subsection (b)(2)

specifically addresses surveys conducted for motor vehicle market research.

And in many respects subsection (b)(12) *is* the more general provision in the litigation context, which certainly does not involve the kind of activities at the core of the bulk distribution provision. Subsection (b)(12) is not a "solicitation exception," but rather permits disclosure with express consent "[f]or bulk distribution for surveys, marketing or solicitations." § 2721(b)(12). As those terms convey, and the legislative history confirms, the provision's principal aim is to regulate the circumstances under which States may sell DMV database information to direct marketers. *See, e.g.*, 139 Cong. Rec. 29,468 (Sen. Boxer) (discussing Act's effect on "States [that] sell personal information to direct marketers"); 139 Cong. Rec. 29,469 (Sen. Warner) (discussing circumstances under which Act "[p]rovide[s] access to this information for marketing purposes"); 140 Cong. Rec. 7,925 (Rep. Moran) (noting that "[m]arketers use DMV lists to do targeted mailings and other types of marketing," which Act "will allow them to continue to do" under certain circumstances).

And it certainly would not be illogical for Congress to treat solicitation in connection with litigation differently from solicitation via bulk distribution to direct marketers. While communication between attorneys and potential clients might, loosely speaking, constitute a form of "solicitation," it is a unique form that "ha[s] long been subject to the State's oversight." *Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977). Not only is solicitation by attorneys subject to forms of

regulation by the state bar with no analog for direct marketers, but solicitation "in connection with" litigation generally also will be subject to the oversight of the court in which the proceeding is pending. Thus, Congress wisely left to the States (and in other contexts, federal courts) how best to address conduct that falls within subsection (b)(4). Should States choose to restrict access to attorneys, or restrict the uses to which attorneys may put such information, they remain free to do so. But the bulk distribution provision, which does not deal with attorneys or litigation at all, in no way requires States to take those steps or supports imposition of liability on attorneys who use information for solicitation that the litigation provision permits.

To the extent Congress' approach in subsection (b)(4) results in overlap with subsection (b)(12), it is the kind of overlap the DPPA tolerates, because Congress wanted to cast a wide net when seeking to ensure that its efforts to keep personal information out of the hands of those who do *not* need it would not have the unintended consequence of keeping it out of the hands of those who do. If the sheer breadth of the overlapping textual provisions leaves any room for doubt on that score, the legislative history confirms that Congress was just as concerned with what the DPPA would *permit* as with what it would *prohibit*. As its primary drafter explained, the Act is designed to "restrict access to all those without a legitimate purpose," not to "limit those legitimate organizations in using the information." 139 Cong. Rec. 27,328 (Rep. Moran); *see also* 140 Cong. Rec. 7,929 (Rep. Goss) ("The flow of information would only be denied to a narrow group of people that lack legitimate

business."). Although Congress made sure "someone coming in off the street, without a permissible purpose could not gain access to" personal information, it also made sure "insurance companies, law enforcement professionals, attorneys, and all other authorized users would continue to have access to this information." 140 Cong. Rec. 7,925 (Rep. Moran). And it did so by constructing a set of overlapping permissible-use provisions that leave States with discretion to decide whether to disclose information to the authorized users they cover.

In the end, because of the substantial overlap of the various permissible-use provisions and the absence of any indication that they were intended to be mutually exclusive, petitioners' argument is less that the specific-controls-the-general than an effort to convert subsection (b)(12)'s authorization of bulk distribution for solicitation with consent into a blanket prohibition on solicitation without consent. Neither the specific-controls-the-general canon nor any other principle of statutory construction can justify that feat of legal alchemy. Permission for use with consent remains permission, and in no way suggests that a different permissible-use provision for which consent is not a prerequisite is inapplicable. Indeed, the flaw in petitioners' theory is evident in considering a permissible use under subsection (b)(4) that would otherwise be wholly impermissible. While bulk distributions and solicitations may be annoying, they are not life threatening, which is why the DPPA permits them with consent. The use of information to serve process on a defendant at her home is much closer to the core concerns that prompted the DPPA, yet subsection

(b)(4) unambiguously authorizes disclosure for that purpose. It would be more than passing strange if conduct that not only satisfies subsection (b)(4) but could also satisfy subsection (b)(12) if consent were obtained were treated less favorably than conduct that would be wholly prohibited but for subsection (b)(4). But that is the inevitable consequence of petitioners' misguided effort to convert subsection (b)(12)'s limited permission into a prohibition.

2. Applying the specific-controls-the-general canon to the DPPA would not serve the canon's underlying rationales.

"To apply a canon properly one must understand its rationale." *Varity*, 516 U.S. at 511. Precisely because the DPPA provides a series of overlapping and not mutually exclusive permissible-use provisions, it does not present either of the issues—contradiction or superfluity—that the specific-controls-the-general canon is typically applied to address. That only underscores why petitioners' attempt to invoke the specific-controls-the-general framework would frustrate rather than further the ultimate goal of effectuating Congress' intent.

"The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is *contradicted* by a specific prohibition or permission." *RadLAX*, 132 S. Ct. at 2071 (emphasis added); Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Text* § 28 (2012) ("[t]he general/specific canon ... deals with what to do when conflicting provisions simply cannot be reconciled"). In that context, "the

specific provision is construed as an exception to the general one" in order "[t]o eliminate the contradiction" that would otherwise exist. *RadLAX*, 132 S. Ct. at 2071; *see, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (invoking canon to resolve conflict between laws prohibiting employment discrimination and statutes granting hiring preferences to Native Americans). Plainly, there is no such contradiction to eliminate here because subsections (b)(4) and (b)(12) both *permit* disclosure of personal information and do not conflict with each other at all. The provisions are instead more readily governed by the rule that "so long as there is no 'positive repugnancy' between two" provisions, "a court must give effect to both." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *Mancari*, 417 U.S. at 551 (when provisions "are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective").

Recognizing as much, petitioners focus on cases applying the canon to statutes "in which a general authorization and a more limited, specific authorization exist side-by-side." *RadLAX*, 132 S. Ct. at 2071. But those do not help petitioners, either, because the canon applies in that context only when necessary to "avoid[] ... the superfluity of a specific provision that is swallowed by the general one." *Id.*; *see also D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) (canon effectuates "the cardinal rule that, if possible, effect shall be given to every clause and part of a statute"). Because subsection (b)(4) is no more general or specific than subsection (b)(12), and allows access to restricted information that could

never be disclosed under subsection (b)(12), no such superfluity problem exists here.[2]

To be sure, by permitting solicitation when it is in connection with litigation, subsection (b)(4) necessarily overlaps with subsection (b)(12) to some extent. But "this Court has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001). Subsections (b)(4) and (b)(12) easily satisfy that standard. Many (indeed, most) instances in which information is used for solicitation will not be in connection with litigation, just like many (indeed, most) instances in which information is used in connection with litigation will not involve solicitation. Like the DPPA's many other overlapping provisions, each governs in a sphere that the other does not threaten to subsume because neither is any more specific or general than the other, and neither was designed to be exclusive. In those circumstances, a use that falls within the overlap of two provisions is an easy case. There is no need to invoke the specific-controls-the-general canon

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[2] If restricted information were used for solicitation in connection with litigation, the bulk distribution provision, which never allows access to restricted information, would simply be irrelevant—it would not somehow rise up and prevent the access to restricted information that subsection (b)(4) allows. But the same is true for information where the State has not obtained consent. The absence of consent renders subsection (b)(12) inapplicable, not dispositive, when subsection (b)(4) also applies.

or otherwise try to determine which permissible-use provision takes precedence.

That makes the DPPA readily distinguishable from the statutory scheme this Court considered in *RadLAX*, the principal case on which petitioners rely. *RadLAX* involved a statute that contained three provisions setting forth different circumstances under which a Chapter 11 bankruptcy plan could be confirmed despite a class of creditors' objections. *See* 11 U.S.C. § 1129(b)(2)(A). The first provision established "the rule for plans under which the creditor's lien remains on the property," the second established "the rule for plans under which the property is sold free and clear of the creditor's lien," and the third served as "a residual provision covering dispositions under all other plans." *RadLAX*, 132 S. Ct. at 2072. The debtor sought to invoke the third provision to obtain confirmation of a plan under which it would sell the property free and clear of the creditor's lien, but without complying with the second provision's requirements for doing so. Relying on the specific-controls-the-general canon, the Court rejected the debtor's argument.

As the Court explained, application of the canon was necessary there to "avoid[] ... the superfluity of a specific provision that is swallowed by the general one." *Id.* at 2071. That superfluity problem arose because, under the debtor's reading, the second provision would be "entirely a subset" of the third residual provision, which "applie[d] to *all* cramdown plans, ... includ[ing] all of the plans within the more narrow category described in" the second provision. *Id.* at 2072-73. Thus, if "the general language" of the

residual provision were interpreted so broadly as to allow circumvention of the specific requirements for plans governed by the first two provisions, those provisions would no longer serve any independent purpose, and the three as a whole would no longer have the mutually exclusive operation Congress intended. *Id.* Here, by contrast, there remain plenty of solicitations not in connection with litigation and plenty of uses in connection with litigation that do not constitute solicitation. Accordingly, there is no risk of superfluity.

This case is thus more analogous to *Varity Corp. v. Howe*, a case in which the Court declined to apply the specific-controls-the-general canon to statutory provisions that, much like the subsections of section 2721(b), contained significant overlap but were neither mutually exclusive nor superfluous. *Varity* involved a provision of ERISA that authorized beneficiaries to bring a civil action to obtain, among other things, "appropriate relief under section 409" of ERISA, § 502(a)(2), and also "other appropriate equitable relief," § 502(a)(3). Although those subsections clearly overlapped, neither rendered the other redundant because subsection (a)(2) authorized non-equitable compensatory and punitive damages that subsection (a)(3) did not, and subsection (a)(3) authorized additional equitable relief that subsection (a)(2) did not. 516 U.S. at 509. Nonetheless, the plan administrator invoked the specific-controls-the-general canon to argue that beneficiaries should not be able to seek equitable relief under subsection (a)(3) unless it was also available under section 409 because to do so would circumvent a limit implicit in subsection (a)(2). *Id.* at 510.

Finding no reason to "believe that Congress intended the specific remedies in § 409 as a *limitation*" on the additional remedies the other provisions of section 502 authorized, the Court rejected the plan administrator's argument. *Id.* at 511. As the Court explained, the overlap between section 502's six subsections, which authorized a wide range of remedies in a variety of different circumstances, evinced Congress' intent to create a unified "safety net, offering appropriate and equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy," not its intent to render each provision an implicit limitation on the others. *Id.* at 512.

The same is true here. While subsections (b)(4) and (b)(12) contain some minor overlap, that overlap is typical of the 14 permissible-use provisions, which plainly were not designed to be mutually exclusive. The overlap is not some inadvertent flaw in the statutory scheme, but a natural consequence of Congress' efforts to draft the permissible-use provisions broadly to guard against unintended preemption of state law and inadvertent imposition of massive liability and even criminal fines for conduct that it had no desire to prohibit or regulate.

Attempting to prove otherwise, petitioners invoke dictum from *RadLAX* to the effect that the specific-controls-the-general canon is not "confined to situations in which the entirety of the specific provision is a 'subset' of the general one," but also governs "[w]hen the conduct at issue falls within the scope of *both* provisions, ... whether or not the specific provision also applies to some conduct that

falls outside the general." *RadLAX*, 131 S. Ct. at 2072. That observation was dictum because in the end the Court held that the second provision of the statute *was* "entirely a subset" of the third, which is why the Court explained that the canon must be applied to "avoid[] ... the superfluity of a specific provision that is swallowed by the general one." *Id.* at 2071, 2072. In any event, whatever the scope for invoking the specific-controls-the-general canon to avoid substantial as well as total superfluity, it cannot be invoked when Congress designed various provisions to overlap and did not intend them to be mutually exclusive.

Thus, it is hardly surprising that petitioners' other cases involved the same kind of obviously general or catch-all provision and the same resulting superfluity problem as *RadLAX*. *See, e.g.*, *Bloate v. United States*, 130 S. Ct. 1345 (2009) (applying canon where proposed reading of Speedy Trial Act provision would render superfluous specific provision dealing with pretrial motions); *HCSC-Laundry v. United States*, 450 U.S. 1 (1981) (applying canon where proposed reading of tax exemption provision for charitable organizations would render superfluous specific provision addressing charitable cooperative hospital services); *Popkin*, 285 U.S. at 206 (applying canon where proposed reading of provision allowing bankruptcy courts to "make such orders ... as may be necessary" would render superfluous specific provision limiting circumstances in which they may issue arrest warrants); *United States v. Chase*, 135 U.S. 255, 261 (1890) (applying canon where proposed reading of provision banning obscene "writings" from mail would render superfluous specific provision

limiting circumstances in which "letters" could be banned).

By contrast, in cases involving statutes or provisions where, like the DPPA, any overlap does not cause superfluity and reflects Congress' desire to legislative comprehensively, "this Court has not hesitated to give effect to" both. *J.E.M. Ag Supply*, 534 U.S. at 144; *see also, e.g.*, *Varity*, 516 U.S. at 511; *Germain*, 503 U.S. at 253 (refusing to apply canon to read statute conferring appellate jurisdiction over final bankruptcy decisions as "precluding ... by negative implication" general grant of jurisdiction over interlocutory appeals). Because that is also the situation here, the specific-controls-the-general canon need not and should not apply.

Finally, *RadLAX* is also readily distinguishable because it did not involve any competing canons of interpretation. *RadLAX* resolved an ambiguity concerning the relative roles of two bankruptcy provisions that did not implicate potential criminal liability or the federal-state balance. Here, both considerations are implicated and both give rise to canons under which ambiguities are resolved against liability. The DPPA not only authorizes criminal fines against violators, § 2723(a), but also contains a liquidated damages remedy in its civil suit provision that routinely, as here, produces astronomical damages requests (typically accompanied by a plea for punitive damages as well), § 2724(b). Moreover, while States themselves are exempt from some of those provisions, municipalities and state and local actors are not. It is one thing to apply the specific-controls-the-general canon when determining whether a

bankruptcy plan will be confirmed or an organization will be tax-exempt. It is another thing entirely to apply it when the result would be sanctioning criminal and massive civil liability for engaging in conduct that a statute on its faces declares permissible. In that context, the canon simply cannot supply by implication the requisite clarity the statute lacks. And a Congress leery of intruding too deeply on States' management of their own databases—let alone the practice of law—should not be deemed to have preempted state law and upset the federal-state balance based on a mere inference that subsection (b)(12) was intended to occupy the field of solicitation, even if the solicitation comes within the terms of subsection (b)(4) or another permissible-use provision.

3. Applying the specific-controls-the-general canon to the DPPA would violate more readily applicable statutory construction principles.

That the DPPA implicates sensitive federalism concerns provides yet another reason why the specific-controls-the-general canon cannot be applied to expand its regulatory reach. The DPPA is no ordinary statute. It not only preempts state laws that would permit certain disclosures, but it regulates the States directly. Indeed, its first and central aim is to regulate States, by "restrict[ing] the States' ability to disclose a driver's personal information." *Condon*, 528 U.S. at 144. Because that kind of direct interference with "the integrity, dignity, and residual sovereignty of the States," *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011), is a delicate constitutional matter, Congress carefully

limited it with a broad set of permissible uses for which States may continue to disclose information as they see fit without running the risk of civil penalties or federal lawsuits against their employees and agents. Some of those provisions avoid federal intrusion into the State's own functions or into professions traditionally regulated by the States, but all operate in the first instance to limit federal regulation of a State's disclosure of information from its own database. Any suggestion that the bulk distribution provision should be read to *implicitly* prohibit conduct that other provisions of the DPPA *explicitly* permit therefore is readily overcome not just by the presumption against preemption but also by the constitutionally compelled rule that "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.'" *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

That rule applies with full force to the DPPA's litigation provision. Because "lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts,'" *Goldfarb*, 421 U.S. at 792, this Court has recognized routinely "the State's strong interest in regulating members of the Bar." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 467 (1978). The Court has also emphasized "the importance of the State's interest in regulating solicitation of paying clients by lawyers," *id.* at 459 n.16, and noted that "controls over solicitation and advertising by attorneys have long been subject to the State's oversight." *Bates*, 433 U.S. at 362. While the First

Amendment remains a check on how stringent such regulation may be, beyond that, both Congress and this Court have been wary of "Federal interference with a State's traditional regulation of [the legal] profession." *Id.*

By insisting that the bulk distribution provision must be satisfied even when solicitation is in connection with litigation, petitioners would create exactly the kind of federal interference with state regulation of lawyers Congress sought to avoid. That much is clear from their ready concession that, in their view, the bulk distribution provision preempts any state law that authorizes attorneys to obtain information from DMV databases to contact potential clients in connection with litigation. Br.52. Indeed, according to petitioners, even if an attorney had "an *ethical duty*" to solicit an individual whose information was available through a state DMV database—which arguably was the situation in this very case, given the representational nature of the MDDA suit, *see* Pet.App.61—the bulk distribution provision would *still* prevent the attorney from doing so absent express consent. Br.54 (emphasis added).

Nothing in the DPPA comes close to confirming that Congress intended to preempt regulation of those matters "at the core of the State's power," *Bates*, 433 U.S. at 361, let alone intended the extreme form of preemption petitioners press. "[I]n all pre-emption cases, and particularly in those" involving "a field which the States have traditionally occupied," this Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was

the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Far from evincing that requisite clear and manifest intent to preempt, subsection (b)(4) evinces Congress' clear and manifest intent to *avoid* interference with the States' historic power to regulate members of their bars and determine the extent to which attorneys should have access to information in their DMV databases.

To be sure, the DPPA manifests Congress' intent to preempt the state laws it was specifically targeting—namely, those permitting disclosure of personal information to any and all comers for a small fee. *See Condon*, 528 U.S. at 147; 140 Cong. Rec. 7,924 (Rep. Moran) (DPPA "close[s] a loophole in State law that allows anyone, for any reason, to gain access to personal information" by purchasing it from state DMV). But when it came to whether the DPPA should prohibit attorneys from accessing such information, Congress unmistakably eschewed interference with existing state regulatory regimes by providing attorneys broad access to such information for any and all uses in connection with litigation. *See, e.g.*, 140 Cong. Rec. 7,925 (Rep. Moran) ("insurance companies, law enforcement professionals, *attorneys*, and all other *authorized users* would continue to have access to this information" (emphasis added)). Indeed, even petitioners are forced to acknowledge that "lawyers are given unique access to information in DMV databases" under the DPPA, Br.33, which is clear from the fact that they are one of only a few select groups given access to highly restricted information. § 2721(b)(2). Certainly a federal law that explicitly

protects broad attorney access to personal information cannot be read to implicitly preempt state laws that allow such access.

Of course, that does not mean States are required to give attorneys access to their DMV databases, whether attorneys seek information for solicitation, investigation, service of process, or other purposes the DPPA permits. The DPPA does not restrict the States' ability to deny access to their databases to the extent they deem appropriate. *See* 139 Cong. Rec. 29,468 (Sen. Boxer) ("States are free to be more restrictive with this information."); 139 Cong. Rec. 29,469 (Sen. Warner) (Act will "[a]llow States to enact tougher restrictions"). The consequences of resolving any ambiguity here are thus asymmetrical. Construing subsection (b)(12) to trump subsection (b)(4) via the specific-controls-the-general canon would preempt state law and opens up massive civil and criminal liability. Recognizing that subsection (b)(4) applies would leave States in their traditional position of regulating the legal profession and determining the proper scope of disclosure in connection with litigation. Given "the State's strong interest in regulating members of the Bar," *Ohralik*, 436 U.S. at 467, adopting petitioners' position not only is inconsistent with basic principles of statutory construction, but also would violate the rule that courts should not interpret a "statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the

legislation." *Owasso Indep. Sch. Dist. No. 1-011 v. Falvo*, 534 U.S. 426, 432 (2002).[3]

That conclusion is further reinforced by the fact that, notwithstanding petitioners' efforts to portray this as a case about a "special dispensation" for attorneys, Br.41, needlessly exposing attorneys to massive liability is not the only unintended consequence of petitioners' proposed reading of the DPPA. If petitioners were correct that subsection (b)(12) implicitly prohibits all solicitation without express consent, then it would also prohibit government agencies or actors from using personal information "for surveys, marketing or solicitations" without "express consent," § 2721(b)(12), even if the government agency or actor did so in the course of "carrying out its functions," § 2721(b)(1). Certainly all the same arguments petitioners make here would apply with the same force to subsection (b)(1), which is just as broad as subsection (b)(4) and is equally silent on those activities.

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[3] Giving subsection (b)(4) its full effect also serves separation of powers principles. Subsection (b)(4) by its plain terms allows disclosure and use of information in connection with federal as well as state court litigation. When, as here, DMV information is used to facilitate a lawsuit, including by communicating with absent class members or even potential additional plaintiffs to cure a standing problem, it is subject to oversight by the federal court in a way that is completely different from the ordinary disclosures the DPPA targeted. Just as courts should not lightly infer that Congress wanted to upset the federal-state balance, there is no reason to lightly infer that Congress intended to impose DPPA liability for actions taken in connection with litigation being overseen by state and federal courts.

Indeed, all the same arguments *were* made before (and rejected by) the Eleventh Circuit in a case involving billion-dollar multi-district DPPA litigation against a government contractor. *See Rine*, 590 F.3d at 1225. As the United States explained in urging the contrary view, nothing in the DPPA remotely suggests Congress intended a provision *permitting* disclosure for solicitation under certain circumstances to trump the government functions provision and expose government actors to massive liability for using personal information for surveys, marketing, or solicitations in the course of carrying out their functions. *See* Br. of United States as *Amicus Curiae*, *Rine v. Imagitas, Inc.*, No. 08-148800-AA (11th Cir. 2009); Statement of Interest of the United States, *In re: Imagitas, Inc.*, No. 3:07-md-00002 (M.D. Fla. 2007) (Doc. 71). Rather, both "the plain language" and "the structure of the statute" confirm that "if any of the 14 enumerated exceptions, which are all of equal rank, are applicable, the disclosure of personal information is allowed." *Id.* at 11-12. That "Congress had a particular concern about the sale of personal information 'to commercial enterprises, solicitors, and direct marketers'" does not mean that it sought to "regulate or prohibit all bulk marketing activities; rather the DPPA ... places restrictions only where the statutory exceptions do not apply." *Id.* at 14-15.[4]

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[4] Even if petitioners were to argue that the bulk distribution provision somehow does not trump subsection (b)(1), that would not help them here because the District Court correctly concluded that respondents also satisfied that provision.

In fact, there is every reason to think Congress did *not* intend to regulate all such activities, as doing so in the context of government functions or litigation would run counter to Congress' efforts to confine the DPPA's regulatory reach to matters more obviously within the scope of its commerce power. Release of information contained in state DMV databases is not inherently a matter of federal concern. This Court recognized as much in *Condon*, when it repeatedly emphasized that it was willing to treat that information as an "an article of commerce" only in the limited "context of this case," which involved the "sale or release of that information *in interstate commerce*." 528 U.S. at 148-49 (emphasis added); *see also id.* at 149 ("drivers' personal information is, in the context of this case, an article in interstate commerce"). The Court expressly declined to address the federal government's alternative and much more attenuated argument that "the States' individual, intrastate activities in gathering, maintaining, and distributing drivers' personal information have a sufficiently substantial impact on interstate commerce to create a constitutional base for federal legislation." *Id.* at 148-49. Thus, to allow the solicitation provision to trump all others—even those expressly disclaiming regulation of activities nowhere near the core commercial activity at issue in *Condon*—would create difficult constitutional questions both Congress and this Court sought to avoid.

Pet.App.79a-81a. Although the Court of Appeals had no need to reach that issue, at the very least, a remand therefore would be necessary were the Court to conclude that the bulk distribution provision trumps subsection (b)(4) alone.

II. The DPPA's Litigation Provision Does Not Implicitly Exclude All Conduct That Might Be Construed As Solicitation.

Petitioners alternatively contend that even if the bulk distribution provision does not trump the litigation provision altogether, the latter nonetheless should be construed to exclude use of personal information for solicitation in connection with litigation. That argument largely rests on the same flawed premises underlying petitioners' misplaced reliance on the specific-controls-the-general canon. Congress intended overlap among the DPPA's permissible-use provisions and drafted subsection (b)(4) in broad terms to avoid interference with use of information by state-regulated attorneys. There is no reason not to give Congress' words their intended breadth. As this case demonstrates, nothing about litigation-related activities that could be characterized as solicitation makes them any less "in connection with" litigation. Indeed, if this Court were going to construe subsections (b)(4) and (b)(12) to avoid any overlap, the more logical conclusion would be that efforts by attorneys to contact individuals with whom they already have a distinct relationship by virtue of the filing of a state-law representative action do not constitute solicitation. But whether solicitation or not, respondents' efforts to do "what any good lawyer would have done" in connection with the *Herron* litigation cannot be construed to fall outside subsection (b)(4). Pet.App.38a.

A. The Permissible-Use Provisions Must Be Construed Broadly to Preserve the DPPA's Delicate Constitutional Balance.

At the outset, petitioners' attempt to impose a limiting construction on the litigation provision rests on a faulty premise. According to petitioners, subsection (b)(4)—and presumably all of 2721(b)'s permissible-use provisions—must be read narrowly because when "a general statement of policy is qualified by an exception," courts "usually read the exception narrowly in order to preserve the primary operation of the provision." *Comm'r v. Clark*, 489 U.S. 726, 739 (1989). Whatever force that principle may have in other contexts, it has none here. Quite the contrary, those provisions must be construed broadly to protect the delicate federal-state balance Congress sought to achieve and to avoid interference with traditional state matters such as regulation of the bar. Thus, all the same statutory interpretation principles that counsel against application of the specific-controls-the-general canon counsel against imposing an unintended narrowing construction on the permissible-use provisions, which serve the essential function of limiting the statute's regulatory reach to activities at the core of Congress' commerce power. *See supra* Part I.B.3.

Indeed, even the premise that the DPPA reflects "a general statement of policy ... qualified by an exception," *Clark*, 489 U.S. at 739, is at fundamental odds with the statute. The permissible-use provisions are not mere exceptions to a general prohibition on disclosure. Rather, they are an integral part of the prohibition itself, which applies only to disclosures

that are not for a permissible use. *See, e.g.*, §§ 2721(a)(1), 2722(a). That is because the DPPA was designed to ensure that "[t]he flow of information would only be denied to a narrow group of people that lack legitimate business," not to interfere with "the legitimate public and business interests in keeping these records available," or the States' traditional discretion to regulate those activities. 140 Cong. Rec. 7,929 (Rep. Goss); *see also* 139 Cong. Rec. 29,470 (Sen. Biden) (statute "is narrowly tailored in that it carefully preserves the right of States to disseminate this private information for legitimate purposes"). To assume that the DPPA's critical permissible-use provisions must be construed narrowly thus would upset the sensitive constitutional and policy balance Congress struck.

Petitioners cannot get around that reality by arguing that giving the permissible-use provisions their intended scope might marginally "increase[] the risk of inadvertent disclosure to" would-be stalkers. Br.44. That mistakes the DPPA for a general privacy protection provision Congress did not intend, and one that might well be beyond Congress' power to enact. Rather than promote privacy at all costs, Congress targeted a particular problem within its commerce power and left substantial areas to state regulation through the 14 separate permissible-use provisions. While narrowing every one of those provisions would limit disclosure (and increase criminal exposure and federal intrusion in state affairs), it would not remotely reflect Congress' intent in enacting the DPPA. Congress addressed the concerns petitioners raise by directing many of the permissible-use provisions to individuals who are already subject to

substantial oversight and prohibiting the making of a "false representation" to obtain personal information. § 2722(b); *cf.* 139 Cong. Rec. 29,468 (Sen. Warner) ("There are specific exceptions of course for law enforcement individuals and other areas where proven experience shows that this information should flow. But in those instances we have to presume it is somewhat protected.").

B. Nothing in the Text of Subsection (b)(4) Supports Any of the Vague "Narrowing" Constructions Petitioners Propose.

The text of subsection (b)(4) also lends no support to petitioners' attempt to manufacture a special carve-out to exclude solicitation in connection with litigation. Subsection (b)(4) permits disclosure of personal information

> [f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

§ 2721(b)(4). Notwithstanding petitioners' contrary contention, there is nothing the least bit "narrow" about that language. Br.32. The provision's terms—"in connection with," "any" (thrice), "including"—convey breadth and readily encompass efforts to contact individuals who might want to take part in anticipated or ongoing litigation. Thus, the statute's

"expansive language offers no indication whatever that Congress intended the limiting construction" petitioners "now urge." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980).

Petitioners attempt to demonstrate otherwise by applying canons such as *noscitur a sociis* and *ejusdem generis* to the terms that following "including," but this Court "do[es] not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008). And here the terms Congress employed and the illustrative examples all indicate breadth, rather than some implicit intent to limit subsection (b)(4)'s reach.

At the outset, the phrase "in connection with" is a term of great breadth. *United States v. Loney*, 219 F.3d 281, 284 (3d Cir. 2000). And the word "including" generally "signal[s] that the list that follows is meant to be illustrative rather than exhaustive." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2287 (2010); *see also* Singer & Singer, 2A Sutherland Statutes & Statutory Construction § 47:7 (7th ed. 2007) ("[T]he word 'includes' is usually a term of enlargement, and not of limitation"). Plainly, that is the case in subsection (b)(4), which provides examples that do not begin to exhaust the many permissible uses to which personal information might be put in connection with litigation. And the included examples are truly illustrative. They do not carry any implicit intent to exclude other uses in connection with litigation, but do seem to cover the litigation process from its pre-filing beginnings to its utter end (execution of judgment). That the statute specifically

mentions "investigation *in anticipation* of litigation," for example, does not mean that it excludes access to personal information for investigation once litigation has commenced.

Moreover, "[a] list of three items, each quite distinct from the other no matter how construed, is too short to be particularly illuminating." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 130 S. Ct. 1396, 1403 (2010). The examples provided in subsection (b)(4)—"the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders"—are simply "too few and too disparate to qualify as 'a string of statutory terms,' ... or 'items in a list'" giving rise to some limitation. *Id.*

Indeed, it is not "apparent what common attribute connects" those examples, other than their comprehensive cradle-to-grave coverage of the litigation process. *Ali*, 552 U.S. at 225. Petitioners struggle mightily to identify a theme in the pudding, but the best they can come up with is a collection of vague phrases no more illuminating than "in connection with" litigation. *See, e.g.*, Br.39 ("Each furthers the integrity of a judicial or administrative proceeding."); *id.* (each "further[s] a necessary step in the ... proceeding" or "the truth-seeking function of a court or agency"); Br.35 (each "ensure[s] a court or other tribunal's ability to make or effectuate a judgment"). Those are hardly phrases of limitation or concepts that lend themselves to judicial administration. Nor is it obvious that they necessarily exclude solicitation. *See infra* Part II.C.

Petitioners alternatively contend (at 41-42) the litigation provision must be read to exclude solicitation lest other provisions using the words "in connection with" be read to encompass solicitation as well. But that argument runs into the problem that one of those provisions (one petitioners conveniently fail to mention) *does* quite clearly permit activities covered by subsection (b)(12). Subsection (b)(2) permits disclosure (regardless of consent) "[f]or use in connection with ... motor vehicle market research activities, *including survey research*." § 2721(b)(2) (emphasis added). It is hard to conceive of a narrowing construction that would avoid any overlap between subsections (b)(2) and (b)(12) when it comes to surveys for motor vehicle market research, which underscores that there is nothing inherently "implausible," Br.42, about the notion that Congress considered disclosure for surveys, marketing, or solicitations without express consent consistent with the statute's purpose in certain circumstances narrower than general bulk distribution.

And the provisions petitioners do discuss differ from subsection (b)(4) in both structure and breadth. For example, subsection (b)(10) permits disclosure "[f]or use in connection with the operation of private toll transportation facilities." While that provision clearly reflects Congress' intent to broadly allow States to address disclosures involving the operation of private toll facilities, it is not obvious that "advertising the commuting benefits of the road," Br.43, comes within Congress' broad phrase (although it might). The same is true of subsection (b)(6), which permits disclosure for use "by any insurer ... in connection with ... underwriting." Petitioners identify

no norm of "underwriting" that inherently includes contacting potential underwriting clients. But to the extent any such norm exists, there is no obvious reason why subsection (b)(6) must be read to exclude it, rather than to leave to the States whether and how members of the insurance industry—another area at the core of the States' police power—may access and use information stored in their DMV databases.

In short, nothing in the DPPA as a whole or in subsection (b)(4) specifically is "inconsistent with the conclusion that" the litigation provision "sweeps as broadly as its language suggests." *Ali*, 552 U.S. at 226. Congress provided no indication whatsoever that it intended to draw an artificial line between solicitation and all other uses of personal information in connection with litigation, and petitioners are "not at liberty to rewrite the statute to reflect a meaning [they] deem more desirable." *Id.* at 228.

C. Petitioners' Cramped Construction of the Litigation Provision Is Unworkable.

Petitioners' attempt to artificially cabin the scope of the litigation provision also is wholly unworkable in practice. At the outset, other than the fact that it is supposed to exclude solicitation, exactly how petitioners envision their nebulous limiting construction as narrowing the scope of subsection (b)(4) is difficult to discern. Presumably, petitioners do not mean to suggest a subjective analysis, under which each request for personal information is examined to determine whether it would in fact "further[] the integrity" of the relevant proceeding. Br.39. Even apart from finding no support in the statute, that approach would be utterly impractical

for the state DMVs whose disclosure of personal information the DPPA regulates in the first instance.

But if the test is not a subjective one, it is not at all clear why solicitation objectively fails to satisfy it, as solicitation *does* "further[] the integrity" of litigation in many instances. "[S]olicitation may serve vital purposes and promote the administration of justice." *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 639 (1995) (Kennedy, J., dissenting); *see also, e.g.*, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 643 (1985) (solicitation may have "the salutary effect of informing some persons of rights of which they would otherwise have been unaware"). This case is a perfect example. Respondents did not contact the individuals whose information the state DMV provided simply because they sought to "initiat[e] ... a proposed business transaction." Br.41. They contacted them because they were trying to add plaintiffs who had suffered a concrete legal injury relevant to an ongoing representative lawsuit to "rectify" or "remedy" a standing "concern" the trial court was having difficulty resolving. Hrg. 48; *see also* JA224 (acknowledging that respondents sent FOIA requests and letters "to try to satisfy an issue of standing that was raised by [defense] counsel"). Indeed, to the extent respondents' efforts addressed standing concerns and ensured a more concrete adversary presentation, they directly "further[ed] the integrity" of the proceeding. Br.39; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 583 (1992) (standing "assure[s] that concrete adverseness with sharpens the presentation of issues upon which the

court so largely depends for illumination of difficult ... questions").

Moreover, petitioners' attempt to draw a bright line between solicitation and other plainly permissible uses of personal information is doomed by their own concessions. Petitioners do not deny that respondents could have requested and obtained all the same information from the state DMV as part of their efforts to investigate their existing clients' claims that dealers throughout South Carolina were engaged in a conspiracy to charge illegal fees. Br.48-49. Presumably, petitioners would also concede that, as part of those efforts, respondents could have reached out to those individuals by sending them letters advising that they "represent a group of consumers in a pending lawsuit" involving certain fees, "believe that these fees are being charged in violation of South Carolina law," "understand that you may have been charged one of these fees," and "would like the opportunity" to discuss "[t]he exact nature of your legal situation." JA91-92 (emphasis omitted). But because respondents labeled the letters stating all of those same things "advertising material" in order to comply with state law, petitioners claim they crossed some implicit line between permissible investigation and impermissible solicitation. That fine a line simply cannot be the difference between lawful conduct and unlawful conduct when millions of dollars in damages, criminal liability, and the federal-state balance are all stake. *See supra* Part I.C.3.

Indeed, were it really necessary to interpret subsections (b)(4) and (b)(12) to avoid any overlap—and it is not—the far more logical conclusion would be

that an attorney's communications with individuals he may already represent in a representative lawsuit is not solicitation at all. Even petitioners appear to concede that using DMV information to notify class members of their opt-out rights would be protected by subsection (b)(4), Br.40, even though an attorney-client relationship may not exist until that process has occurred. *Cf. Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011). But that is not materially different from the relationship between respondents and the class of individuals petitioners hope to represent.

Although the MDDA representative action is a unique creature of South Carolina law, it has many of the characteristics, if not all the formality, of a class action. *See Herron v. Century BMW*, 693 S.E.2d 394 (S.C. 2010) (repeatedly referring to *Herron* litigation as a "class action suit"). And both the *Herron* trial court and the District Court (which is presumably the federal court most familiar with the MDDA) concluded that respondents had either an attorney-client relationship or at least a fiduciary duty with the purchasers they contacted. JA253-54; Pet.App.61a. Thus, were it really necessary to construe subsections (b)(4) and (b)(12) to avoid any potential overlap, the better conclusion would be that solicitation "in connection with" litigation, at least in these circumstances, is not solicitation within the meaning of subsection (b)(12). But the far more logical conclusion, and the one overwhelmingly supported by the text and structure of the DPPA, is that such overlap is unproblematic because activity that satisfies subsection (b)(4) is permitted without regard to whether it might also constitute "solicitation."

Petitioners seek to capitalize on the fact that the letters respondents sent were prominently labeled "advertising material." But that just underscores the potential interference with state regulation of attorneys inherent in petitioners' argument. In South Carolina, as in many States, professional conduct rules *require* attorneys to label any written communication with prospective clients "advertising material." S.C. R. Prof. Conduct 7.3; *see also* ABA Model R. Prof. Conduct 7.3. Surely contact with individuals similarly situated to plaintiffs in pending lawsuits will often result in inquiries into whether the attorney is willing to represent the contacted individuals as well—particularly in the context of a case like *Herron*, which was in essence a class action lawsuit. Accordingly, even if respondents' letters had modeled petitioners' vision of what an exclusively "investigation-oriented" letter to a non-client should look like, respondents still would have been obligated to label them "advertising material."

Petitioners' argument thus reduces to the notion that respondents' very effort to comply with state ethics rules is what put them in violation of federal law. In other words, petitioners would force an attorney to choose between risking an ethics violation that might result in sanctions or even disbarment and risking a DPPA violation that might result in a multi-million dollar lawsuit or even criminal liability. Indeed, petitioners even go so far as to suggest that respondents violated the DPPA merely by complying with a state bar rule requiring them to supply the Office of Disciplinary Counsel with a copy of their

letter and the distribution list. Br.44.[5] That cannot possibly be what Congress intended when it sought to "close[] a loophole in the law that permits stalkers to obtain—on demand—private, personal information about their potential victims." 139 Cong. Rec. 29,470 (Sen. Biden).

In the end, this case is not nearly as complicated as petitioners try to make it. The precise nature of respondents' communications with individuals whose interests were implicated by the *Herron* litigation is a question that turns on the details of that litigation and the nature of South Carolina's distinctive MDDA representative action. Whether those communications "further[ed] the integrity" of the litigation process, were similar to notifications to class members, or were more like other uses "in connection with" litigation than like ordinary bulk distributions for solicitation may be debatable questions. But what is not debatable is that respondents obtained and used DMV information for "investigation in anticipation of litigation" and for communications "in connection with" the *Herron* civil proceeding. That is more than

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[5] That contention is independently foreclosed by subsection (b)(1), as disclosure to a state agency is clearly for the permissible purpose of "use by any government agency ... in carrying out its functions." § 2721(b)(1); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988) ("the most obvious" way in which States "can regulate" attorney solicitation "is to require the lawyer to file any solicitation letter with a state agency"). Nonetheless, that petitioners' theory would impose massive liability based on attorneys' efforts to comply with state bar rules underscores just how intrusive of traditional state authority they would make the DPPA.

sufficient to bring respondents' conduct within subsection (b)(4) and to resolve this case. Nothing in the bulk distribution permissible-use provision indicates that it is the exclusive mechanism by which conduct that might be viewed as solicitation can comply with the DPAA. And that provision does not remotely provide the kind of clarity necessary to impose criminal liability on conduct that appears to be left to the States under the plain terms of subsection (b)(4). Respondents "did what any good lawyer would have done" in connection with the *Herron* civil proceeding. Pet.App.38a. By the plain terms of subsection (b)(4), those actions were permissible, not the occasion for the imposition of massive liability under the DPPA.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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December 10, 2012

Statutory Appendix

STATUTORY APPENDIX

Driver's Privacy Protection Act,
18 U.S.C. §§ 2721–2725 ..... 1a

Driver's Privacy Protection Act

18 U.S.C §§ 2721–2725

§ 2721. Prohibition on release and use of certain personal information from State motor vehicle records.

(a) **In General.**—A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity

(1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or

(2) highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in the subsections (b)(1), (b)(4), (b)(6), and (b)(9): Provided, That subsection (a)(2) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.

(b) **Permissible Uses.**—Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle

emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et sq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and, subject to subsection (a)(2), may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organizations, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.

(12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) **Resale or Redisclosure.**—An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use

permitted under subsection (b) (but for uses under subsection (b)(11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

(d) **Waiver Procedures.**—A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

(e) **Prohibition on Conditions.**—No State may condition or burden in any way the issuance of an individuals' motor vehicle record as defined in 18 U.S.C. 2725(1) to obtain express consent. Nothing in this paragraph shall be construed to

prohibit a State from charging an administrative fee for issuance of a motor vehicle record.

§ 2722. Additional unlawful acts

(a) **Procurement for Unlawful Purpose.**—It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) **False Representation.**—It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

§ 2723. Penalties.

(a) **Criminal Fine.**—A person who knowingly violates this chapter shall be fined under this title.

(b) **Violations by State Department of Motor Vehicles.**—Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

§ 2724. Civil action

(a) **Cause of Action.**—A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains,

who may bring a civil action in a United States district court.

(b) **Remedies.**—The court may award—

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

§ 2725. Definitions

In this chapter—

(1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

(2) "person" means an individual, organization or entity, but does not include a State or agency thereof;

(3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability

information, but does not include information on vehicular accidents, driving violations, and driver's status;

(4) "highly restricted personal information" means an individual's photograph or image, social security number, medical or disability information; and

(5) "express consent" means consent in writing, including consent conveyed electronically that bears an electronic signature as defined in section 106(5) of Public Law 106-229.

REPLY BRIEF

Supreme Court, U.S.
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No. 12–25

IN THE

Supreme Court of the United States

EDWARD F. MARACICH, *et al.*,
Petitioners,

v.

MICHAEL EUGENE SPEARS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF

The Driver's Privacy Protection Act (DPPA) targets a specific problem—use of DMV information for bulk solicitations—with a specific solution—express consent. By its terms, this consent requirement applies when lawyers sue hundreds of defendants without a proper plaintiff, then obtain tens of thousands of names and addresses from DMV records to solicit plaintiffs with claims against those defendants. As the Fourth Circuit correctly held, that conduct constitutes bulk solicitation within the meaning of the DPPA. According to respondents, however, Congress created an exception to the bulk-solicitation consent requirement for a small subset of lawyers for whom DMV information provides a ready means of identifying potential clients. Indeed, under respondents' view, Congress gave these lawyers the additional, extraordinary right to use highly restricted personal information, such as medical or disability information, to solicit business.

The Fourth Circuit suggested that solicitude for "impact litigation" explained such an anomalous lawyer exception, but respondents abandon that theory. They hypothesize instead that federalism concerns led Congress to draft a series of overlapping permissions that allow broad use of DMV information subject to state regulation. This theory is groundless.

Contrary to respondents' claims, Congress indisputably intended the DPPA to alter the federal/state balance. Indeed, industry argued (as respondents do now) that private use of DMV information should be left to state regulation. But Congress chose instead to regulate both states and private parties. The problem Congress addressed, moreover, was not one of traditional state concern. The DPPA does not regulate the

content of bulk solicitations or address overreaching or customer deception. It addresses the collection of information for one purpose, and its later use for different purposes without consent—a practice the public deemed highly objectionable. States did not traditionally regulate this problem; they created it.

Congress's solution (express consent for bulk commercial use of DMV information) admits of no exception for class action lawyers. As respondents themselves note, another provision that uses the phrase "in connection with" (subsection (b)(2)) expressly exempts one industry (the automotive industry) from *one* aspect of the bulk-use consent requirement (use for market research surveys). This provision confirms that Congress did not create an additional exception for lawyers in a provision that simply uses the phrase "in connection with" but nowhere mentions solicitation.

Requiring lawyers to comply with the bulk-use consent requirement does not force them to violate state ethics rules. Respondents identify no duty to solicit, much less a duty to solicit clients *in bulk*. They fail to address petitioners' showing that they had no client relationship with or obligations to those who purchased cars from the dealers respondents improperly sued. Nor do they explain why they had to discharge any such (hypothetical) duty using DMV information, rather than advertising, as many other lawyers do to find clients.

Finally, excluding lawyer solicitation from the scope of the DPPA's "litigation exception" does not render the law "unworkable." Indeed, respondents' own actions reflect their understanding that the litigation exception does not authorize use for bulk client solicitation. Despite their current claims, they never stated in any DMV request that they sought thou-

sands of names and addresses to solicit plaintiffs. Traditional interpretive tools confirm that the DPPA confers no special entitlement on lawyers.

I. THE BULK SOLICITATION EXCEPTION CONTROLS THIS CASE.

Subsection (b)(12) controls this case because it specifically addresses the conduct of bulk solicitation. Subsection (b)(4), by contrast, says nothing about solicitation, and provides no evidence that Congress consciously chose to permit lawyers to use DMV information for this purpose. Unable to identify any such evidence, respondents seek to recast the DPPA and the concerns underlying its enactment. Contrary to their claims, however, the bulk-solicitation and litigation exceptions are not equally specific. The statute's text and history demonstrate that Congress specifically focused on use of DMV information for bulk solicitation, marketing, and surveys and crafted a nuanced solution that exempted the automotive industry from one restriction (nonconsensual use for research surveys), but provided no comparable exception for lawyers. The canons respondents invoke cannot overcome this showing.

A. The Statute's Structure Raises—But Does Not Resolve—The Interpretive Question Posed By This Case.

Respondents claim that subsection (b)(12) is "not a prohibition at all," but one of several broad, overlapping permissions that has no limiting effect on any other permission. Br. 25. They are mistaken.

Subsection (a) prohibits disclosure of all DMV personal information. § 2721(a). Subsection (b)(12) then lifts that prohibition for "bulk distribution for surveys, marketing or solicitations if the State has obtained ... express consent." § 2721(b)(12). This "per-

mission" thus prohibits use of DMV information for bulk solicitations absent consent. Cf. *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2070 (2012) (clause *permitting* sale of property free of liens with credit-bidding "*proscribes*" such sales without credit-bidding (emphasis added)); *Smith* v. *McCullough*, 270 U.S. 456, 465 (1926) (because a statutory "permission to give short leases was ... an exception to the comprehensive restraint already in place," a lease "not within that permission evidently was ... within the general prohibition"). The question, therefore, is not whether respondents had to satisfy more than one exception. It is whether another exception's general language can be read to authorize bulk solicitations without compliance with the solicitation exception's consent requirement.

That the DPPA sets forth multiple permissions does not answer this question. This Court has often found that restrictions in one permission foreclose resort to a less restricted permission. *RadLAX*, 132 S. Ct. at 2070–71 (credit-bidding restriction in permission for sale of collateral free of liens foreclosed use of another permission that did not require credit-bidding); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 152–58 (1976) (limitation in venue authorization foreclosed use of second venue authorization lacking that limitation); *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 224–29 (1957) (same); *Bloate* v. *United States*, 130 S. Ct. 1345, 1351–58 (2010) (limited exclusion, for Speedy Trial Act purposes, of pretrial-motion-related delay foreclosed resort to unlimited exclusion of delay resulting from "proceedings concerning the defendant"). Respondents' "basic structure" argument "merely points up the question and does nothing to answer it." *Fourco Glass*, 353 U.S. at 228.

B. Subsections (b)(4) And (b)(12) Are Not Equally Specific Provisions.

Respondents claim that subsections (b)(4) and (b)(12) are equally specific, because one specifically addresses litigation while the other specifically addresses bulk solicitations. Br. 26. This "fifty thousand foot" analysis is misguided. When two provisions overlap, the Court seeks to discern which aspects of the overlap were the focus of congressional attention. Thus, it considers whether Congress "'has *deliberately targeted specific problems with specific solutions*,'" *RadLAX*, 132 S. Ct. at 2071 (emphasis added), and assumes that "when the mind of the legislator has been turned *to the details of a subject*, and he has acted upon it," a provision "treating the subject in a general manner ... shall not be considered as intended to affect the more particular or positive ... provisio[n], unless it is absolutely necessary to give the latter ... such a construction." *Radzanower*, 426 U.S. at 153 (emphasis added). Here, all relevant evidence demonstrates that Congress focused carefully on use of DMV information for bulk solicitations, permitted such use only with consent, and created no exception for lawyers.

As a textual matter, subsection (b)(4) addresses litigation at a much higher level of generality than subsection (b)(12) addresses bulk solicitation. The latter specifically addresses a particular act—use of personal information for bulk solicitations. By contrast, the former's "in connection with" language authorizes a category of acts based on their relationship to "proceeding[s]," but does not mention solicitation at all, much less bulk solicitation. Thus, subsection (b)(4) provides no textual evidence that Congress affirmatively contemplated lawyers using personal information (including highly restricted information) to soli-

cit clients, whereas the solicitation exception makes clear that Congress affirmatively conditioned use of personal information for bulk solicitations on consent. Subsection (b)(12) is thus directly analogous to the second exception in *RadLAX*, which was more specific because it was "a detailed provision that spell[ed] out the requirements for selling collateral free of liens," whereas the third exception was "a broadly worded provision that sa[id] nothing about such a sale." 132 S. Ct. at 2071.

Subsection (b)(2) provides additional, compelling evidence that the phrase "in connection with" in other provisions does not override the bulk-use consent requirement. Subsection (b)(2) permits use of DMV information "in connection with ... motor vehicle market research activities, including survey research." § 2721(b)(2). Congress thus created a narrow exception to the consent requirement for *one* industry to engage in only *one* of the three bulk-use activities (bulk research surveys), and did *not* extend that exception to bulk solicitations. Subsection (b)(2) demonstrates that (1) Congress intended the consent requirement to apply to bulk solicitations, even when that would limit marketing efforts by a legitimate and important U.S. industry; and (2) when Congress wished to except certain commercial actors from any aspect of the consent requirement, it expressed that intention through even more specific language. Subsection (b)(4) lacks any such specific language.

This textual evidence reflects the fact that use of DMV information by legitimate businesses for bulk marketing and solicitations was a central problem Congress sought to address. *Reno* v. *Condon*, 528 U.S. 141, 143–44, 148 (2000). Respondents seek to minimize this problem as ancillary to concerns over stalking, or limited to DMV *sales* of information. Br. 2, 29,

31, 60. But Congress had detailed evidence that the public strongly disapproved of nonconsensual disclosure of personal information that was collected for one purpose, then used for a different purpose—disapproval that did not depend on whether the later use resulted from sales of the information or free disclosure.[1] The DPPA's principal sponsor, as well as others, plainly acted on that evidence.[2] Indeed, marketers argued that the law should address stalking alone and leave regulation of private use of DMV information to the states. 1994 WL 212836 (Feb. 3, 1994) (statement of Direct Marketing Association (DMA)). Congress obviously disagreed.[3]

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[1] *See, e.g.*, 1994 WL 212834 (Feb. 3, 1994) (statement of Prof. Mary J. Culnan).

[2] *See* 139 Cong. Rec. 27,327 (1993) (statement of Rep. Moran) ("92 percent of Americans believe that the DMV should not sell *or release* personal data about them without their knowledge and approval." (emphasis added)); *id.* at 29,470 (statement of Sen. Biden) ("Americans do not believe they should relinquish their legitimate expectations of privacy" over personal information "simply by obtaining drivers' licenses or registering their cars"); *id.* at 29,468 (statement of Sen. Boxer) (law "gives people more control over the disclosure of their personal information, especially for those reasons that are totally incompatible with the purpose for which the information was collected").

[3] In light of this history, respondents' reliance, Br. 45–46, on subsection (b)(1) and *Rine* v. *Imagitas, Inc.*, 590 F.3d 1215 (11th Cir. 2009), is misplaced. Profiting from DMV information to defray the costs of government services cannot be a governmental "function" within the meaning of subsection (b)(1), because that is the very practice Congress intended to end. *See Condon*, 528 U.S. at 143–44. Respondents identify no governmental function that entails bulk use of DMV information for non-commercial purposes. Assuming any exists, any conflict would more logically be resolved by limiting subsection (b)(12) to *commercial* surveys, given its focus on "solicitation" and "marketing," and the direct-marketing problem Congress addressed. In all events, a hypo-

Congress's solution, moreover, reflects a detailed and nuanced focus. Recognizing the legitimate needs of businesses, Congress did not ban use of DMV information for bulk solicitations, but instead required consent. It later refined its solution, amending an original "opt-out" to an "opt-in" system. *Condon*, 528 U.S. at 144–45. And, because DMV information was "absolutely essential" to automotive marketing efforts, 1994 WL 212836 (DMA statement), Congress provided a limited carve-out from the consent requirement for bulk automotive marketing surveys.

Respondents cite evidence that Congress expected lawyers to use DMV information, and that it rejected a draft of subsection (b)(4) that permitted use only "in litigation." Br. 6. This merely shows that, in addition to using DMV information *in* litigation, lawyers can use it to investigate claims in advance of, serve process to initiate, and enforce judgments produced in, litigation. What it does *not* show is that, when Congress "turned to the details of [the] subject" of bulk solicitation, *Radzanower*, 426 U.S. at 153, it foresaw that some class action lawyers might use DMV information to solicit clients in bulk and granted them the very exception to the consent requirement it denied to carmakers. This is hardly surprising. Most lawyers are not class action lawyers, and most that are cannot use information in DMV databases to identify potential plaintiffs for securities, employment, medical device, or many other common class actions.

Thus, even if subsection (b)(4)'s general language could otherwise be read, in isolation, to encompass

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thetical conflict between subsection (b)(12) and a governmental function that entails non-commercial bulk use of DMV information does not show that Congress excepted lawyer solicitation from the bulk-use consent requirement.

use of DMV information for bulk solicitation of clients—but see *infra*, Part II—there is no evidence Congress actually "intended [subsection (b)(4)] to affect the more particular" terms of subsection (b)(12). *Radzanower*, 426 U.S. at 153. To the contrary, subsection (b)(2) shows that, when Congress intended to create an exception to the bulk-use consent requirement in another provision that uses the "in connection with" language, it did so explicitly—something it did not do in subsection (b)(4). In sum, subsection (b)(12) more specifically addresses the bulk solicitations at issue here.

C. As The More Specific Provision, Subsection (b)(12) Controls.

Perhaps recognizing the foregoing, respondents claim that the general/specific canon applies only where necessary to avoid rendering one of two authorizations superfluous and, thus, is unavailable here. Br. 33. The Court unanimously rejected this precise argument in *RadLAX*, finding "no authority for the proposition that the canon is confined to situations in which the entirety of the specific provision is a 'subset' of the general one." 132 S. Ct. at 2072. Rather, the Court held, "[w]hen the conduct at issue falls within the scope of *both* provisions, the specific presumptively governs, *whether or not the specific provision also applies to some conduct that falls outside the general*." *Id.* (second emphasis added). If the specific provision also applies to some conduct that falls outside the general, then applying the general/specific canon is not necessary to avoid rendering the specific provision superfluous.

Respondents dismiss that reasoning as "dictum." Br. 37–38. But the Court's conclusion was an independent basis for its decision, and thus cannot "be relegated to the category of *obiter dictum*." *Woods* v. *In-*

terstate Realty Co., 337 U.S. 535, 537 (1949); see also *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 352 (2006) ("It is no answer to argue ... that the holding in *Breard* was 'unnecessary' simply because the petitioner in that case had several ways to lose.").

In any event, this Court has applied the general/specific canon even where there was no arguable problem of superfluity. In *Radzanower*, the Court held that a specific venue provision for suits against national banks controlled a broad venue provision for suits under the Securities Exchange Act. 426 U.S. at 149–58. A contrary interpretation would not have rendered the national bank provision superfluous; it still would have applied to all suits against national banks not brought under the Exchange Act. Similarly, the Court's holding in *Fourco Glass* that a specific venue provision for patent infringement suits controlled a general venue provision for suits against corporations was not necessary to avoid rendering the former provision superfluous because it still would have applied to patent infringement suits against noncorporate defendants. And in *Bulova Watch Co.* v. *United States*, 365 U.S. 753 (1961), a contrary interpretation would not have rendered superfluous the specific provision for interest on tax refunds attributable to an excess profits credit carry-back because it still would have applied to tax refunds that were not awarded by a court judgment.

These cases confirm that a specific authorization controls a general one, "whether or not the specific provision also applies to some conduct that falls outside the general." *RadLAX*, 132 S. Ct. at 2072. Respondents assert without citation that this canon "cannot be invoked when Congress designed various provisions to overlap and did not intend them to be mutually exclusive," Br. 38, but this substitutes con-

clusion for analysis. The entire point of the canon is that, when Congress specifically authorizes an action subject to specified conditions, it intends those conditions to be exclusive, and not to be evaded through reliance on a more general authorization. See *RadLAX*, 131 S. Ct. at 2071; Op. Br. 29.

Respondents' cases are not to the contrary. In two, the question was whether a general provision had been impliedly repealed by a later-enacted provision that a party claimed was more specific. See *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 251–54 (1992); *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 130–45 (2001). The Court accordingly applied the strict "positive repugnancy" standard for implied repeals. *Germain*, 503 U.S. at 253; *J.E.M.*, 534 U.S. at 141–42 ("'statutes [must be] irreconcilable'"); see also *id.* at 137 (emphasizing the "overwhelming evidence needed to establish repeal by implication").[4] By contrast, here the Court's task is to reconcile "a general authorization and a more limited, specific authorization" that "exist side-by-side" in the same statute. *RadLAX*, 132 S. Ct. at 2071. In such cases, the specific authorization "presumptively governs," and its terms "must be complied with," even though there is no "contradiction" between the provisions. *Id.* at 2071–72.

Nor does *Varity Corp.* v. *Howe*, 516 U.S. 489 (1996), help respondents. There the Court held that one pro-

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[4] In both cases, moreover, the general provision's meaning was settled. *J.E.M.*, 534 U.S. at 131, 135 (noting definitive interpretation of utility patent statute); *Germain*, 503 U.S. at 255 (Stevens, J., concurring) (limiting review of interlocutory bankruptcy orders would constitute "a significant change in the scheme of appellate jurisdiction"). Here, the scope of subsection (b)(4) is not settled, and properly construed does not even overlap with subsection (b)(12). *See infra*, Part II.

vision of ERISA, which provided remedies for breach of fiduciary duty only to the ERISA plan, not to beneficiaries, did not implicitly preclude individual remedies for breach of fiduciary duty under a separate provision authorizing participants "to obtain other appropriate equitable relief." *Id.* at 507–15. The first provision's remedial limitations derived from its cross-reference to § 409 of ERISA, which the second provision did not incorporate. *Id.* at 509. Because § 409 "reflect[ed] a special congressional concern about plan asset management," its specific remedies were not intended "as a *limitation*," and did not foreclose the conclusion that "Congress provided yet other remedies for yet other breaches of other sorts of fiduciary obligations in another, 'catchall' remedial section" that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Id.* at 511–12.

The clear "textual indications," *RadLAX*, 132 S. Ct. at 2072, that overrode the general/specific canon in *Varity* are absent here. The litigation exception is not a "catchall" authorizing all uses of personal information not authorized elsewhere. And applying the general/specific canon would not leave violations of law unredressed (as it would have in *Varity*). Instead, as just shown, textual and other evidence confirms that Congress intended the bulk-use consent requirement to govern absent a more specific exception like that set forth in subsection (b)(2) and noticeably missing from subsection (b)(4).

D. The Interpretive Principles Respondents Invoke Are Inapposite.

Because the DPPA's text and history demonstrate that Congress did not grant lawyers a unique exemption from the bulk-use consent requirement, respon-

dents resort to other canons to justify such a result. This effort fails for multiple reasons.

Initially, respondents cite no authority establishing that the canons they cite trump the general/specific canon, nor could they: respondents' canons are used to resolve statutory "ambiguities." Br. 39; see, *e.g.*, *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (presumption against preemption does not apply to a "nonambiguous command to pre-empt"); *Gregory* v. *Ashcroft*, 501 U.S. 452, 470 (1991) ("In the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions"); *DePierre* v. *United States*, 131 S. Ct. 2225, 2237 (2011) (rule of lenity "is reserved for cases where, 'after seizing everything from which aid can be derived, the Court is left with an ambiguous statute'"); *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001) ("canon of constitutional avoidance has no application in the absence of statutory ambiguity"). By contrast, the general/specific canon is used to determine "statutory meaning," *RadLAX*, 132 S. Ct. at 2072, and thus whether there is ambiguity in the first place. Because that canon establishes that the DPPA unambiguously prohibits nonconsensual use of personal information for bulk solicitations by lawyers, respondents' canons never come into play.

Even if they could, however, they would not alter the outcome.

1. Federalism/Preemption.

This case does not implicate any presumption against preemption, as respondents identify no state law that would be preempted. They argue that, under petitioners' interpretation, the DPPA would preempt a hypothetical state law that authorizes lawyers to

use DMV information for solicitation. Br. 42. But such speculation cannot bring the presumption against preemption into play. If it could, the presumption would apply in virtually every statutory interpretation case, because one can nearly always hypothesize a state law that would conflict with the federal law.

Respondents claim that the bulk-use consent requirement conflicts with state ethical duties, but they identify no law, requirement, or ruling—in South Carolina or elsewhere—that imposes a *duty to solicit*, much less to solicit clients *in bulk*. Moreover, by suing dealers with whom their clients had never dealt, respondents did not create any client relationship with, or ethical obligation to, anyone who had purchased cars from such dealers. Contrary to their claims, Br. 58, the *Herron* court made clear that the named plaintiffs were suing "in a representative capacity on behalf of the group of purchasers who purchased vehicles from the same dealership," not purchasers who bought their cars from dealerships with whom those plaintiffs had never dealt. JA 251. The Fourth Circuit rejected respondents' claim of an attorney-client relationship, Pet. App. 27a—a claim inconsistent with the solicitation letters themselves, *id.* at 10a ("'You may wish to consult your lawyer or another lawyer instead of us'"). And respondents do not even address petitioners' showing that dismissal of the improperly named defendants could not have impaired the rights of those who bought from them, Op. Br. 52–53—a showing that precludes any claim of an ethical or fiduciary duty to solicit such persons. Nor did solicitation of such car buyers further the interests of respondents' existing clients. Br. 23. Because those clients had standing to sue the dealerships where they bought cars, their interests would

not have been impaired by dismissal of other dealerships that they could not have sued in the first place.

But even if a duty-to-solicit-clients-in-bulk exists, few lawyers could discharge it using DMV information, because for most lawsuits, DMV databases provide no means of identifying potential plaintiffs (such as victims of securities fraud or a defective drug). Rather, the vast majority of lawyers (including most class action lawyers) could only discharge such a duty through mass advertising. Thus, subsection (b)(12) would simply foreclose one means of discharging this (hypothetical) duty—a means available only to a small subset of uniquely situated attorneys—and would leave intact the methods most lawyers would have to use to discharge such a duty. This ancillary and modest effect on a hypothetical ethical duty works no "significant" alteration in the federal/state balance.

In all events, the DPPA reflects a clear intent to alter the federal/state balance: it *directly regulates the states*, *Condon*, 528 U.S. at 151, and no longer permits them to disclose information "as they see fit," Br. 41, but only in accordance with federal standards, see, *e.g.*, § 2721(b)(14) (permitting disclosure for uses "authorized under state law," but only "if such use is related to the operation of a motor vehicle or public safety"). In so doing, Congress did not intrude on traditional state regulation of attorney solicitation—regulation designed to prevent deception and overreaching—but addressed the problem of nonmisleading use of DMV information that had been collected for an entirely different purpose. States had not traditionally regulated such use but instead had facilitated it. In addressing this new problem, Congress rejected arguments (like those respondents make now) that it should allow "states ... to provide

appropriate solutions" and not "limit the flexibility of states to respond" to unwanted disclosures. 1994 WL 212836 (DMA statement).

2. Constitutional Avoidance.

Nor is there any merit to respondents' tacit reliance on the canon of constitutional avoidance. See Br. 47. In addition to requiring ambiguity, which is absent here, the avoidance canon applies only when one of the competing interpretations "raises serious constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005). There is no serious constitutional doubt that Congress has power to regulate the disclosure and use of personal information for mass marketing of legal services, particularly where, as here, the mail is used to distribute the marketing materials. The unanimous Court in *Condon* easily dispatched constitutional challenges to the DPPA, holding that the statute was a proper exercise of Congress's authority under the Commerce Clause because drivers' information is "an article of commerce," and its "sale or release into the interstate stream of business is sufficient to support congressional regulation." 528 U.S. at 148.

Respondents assert that their use of the information is "nowhere near the core commercial activity at issue in *Condon*," Br. 47, but they never explain why information used by lawyers engaged in interstate commerce to recruit clients to sue car dealers engaged in interstate commerce is any less "an article in interstate commerce" than information used by other mass marketers to advertise their services and products. Nor do they raise any serious doubt that mass marketing of legal services substantially affects interstate commerce. See 139 Cong. Rec. 29,468 (1993) (statement of Sen. Boxer) ("with mail, cars, and harassment involved, this issue clearly has an

impact on interstate commerce"); cf. *Goldfarb* v. *Va. State Bar*, 421 U.S. 773, 783–85 (1975). Certainly this activity is far closer to the "core commercial activity" at the heart of Congress's commerce power than other activities that respondents concede Congress expressly targeted in the DPPA, such as the disclosure of personal information to a stalker.

3. Rule of Lenity.

Respondents also repeatedly invoke the fact that violation of the DPPA may give rise to criminal liability. But, "after considering text, structure, history, and purpose, there remains [no] 'grievous ambiguity'" calling for application of the rule of lenity. *Barber* v. *Thomas*, 130 S. Ct. 2499, 2508 (2010). Moreover, Congress adequately addressed any concern about fair notice by providing criminal penalties only for those who "knowingly violat[e]," § 2723(a), an Act that makes it unlawful "knowingly to obtain ... personal information ... for any use not permitted under section 2721(b)," § 2722(a)).

II. THE LITIGATION EXCEPTION DOES NOT PERMIT LAWYER SOLICITATION.

Properly construed, the litigation exception does not permit use of personal information for solicitation; it permits uses that enable tribunals to make or effectuate judgments. Op. Br. 31–44. Respondents claim a broad construction is necessary "to protect the delicate federal-state balance Congress sought to achieve and to avoid interference with traditional state matters." Br. 49. But respondents' federalism claims are misplaced. See *supra*, 14–16. Stripped of this premise, their reading violates several interpretive norms and produces inexplicable anomalies.

1. Respondents repeatedly stress the breadth of the phrase "in connection with." Br. 22–23, 52, 55. But

this Court has warned against such "uncritical literalism," and seeks to discern the limits of such indeterminate language based on context. Op. Br. 34. Here, because the DPPA imposes a flat prohibition subject to exceptions, an exception such as subsection (b)(4) should be construed narrowly.

Apart from their misplaced federalism claims, respondents claim this rule is inapplicable because the "permissible-use provisions are not mere exceptions to a general prohibition" but are "an integral part of the prohibition itself." Br. 49. But any exception to a general prohibition can be characterized this way. Any exception fine-tunes the prohibition and thus may be considered part of the "prohibition itself." Respondents' argument would thus swallow the rule that courts read the exception narrowly so that it does not extend to anything not "plainly and unmistakably within its terms." *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945). Nor can respondents avoid this narrowing rule based on a single floor statement. Br. 50. This statement does not alter the fact that the DPPA imposes a broad prohibition subject to exceptions—precisely the situation requiring courts to "read the exception narrowly." *Comm'r* v. *Clark*, 489 U.S. 726, 739 (1989).

Contrary to respondents' strawman suggestion, moreover, a narrowing construction is not justified to "promote privacy at all costs." Br. 50. It is necessary to prevent the "particular problem" Congress "targeted," *id.*—collection of personal information for one purpose and its disclosure, without consent, for another. Because the litigation exception permits disclosure without consent, and does so with respect to the most sensitive information DMVs collect, it is implausible that Congress afforded lawyers access to

DMV information such as medical and disability status and social-security numbers to solicit clients.

Respondents argue that subsection (b)(4)'s terms "convey breadth." Br. 51. As noted, their reliance on the breadth of "in connection with" is misplaced, as that phrase cannot be construed in isolation. The word "any," while broad, modifies proceedings and tribunals, not "uses" of DMV information. This confirms that the litigation exception exists for the benefit of dispute resolution processes, not the financial interests of lawyers.

Nor does the term "including" support respondents' broad reading. In *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2287 (2010), this Court narrowed a general phrase by reference to a nonexhaustive list that followed the term "including." Thus, *Samantar* fully supports interpreting "in connection with" according to the well-established rule that a term or phrase is "'known by the company it keeps.'" *Id.* at 2287–88.

Respondents claim that subsection (b)(4)'s examples are "too few and too disparate" and lack any "common attribute" that "connects" them. Br. 53 (internal quotation marks omitted). But each use furthers a tribunal's ability to make or enforce a judgment; none refers to commercial activities by lawyers. Op. Br. 39–41. Because lawyers function both as commercial actors and officers of courts, see *Cohen* v. *Hurley*, 366 U.S. 117, 124 (1961), *overruled on other grounds by Spevack* v. *Klein*, 385 U.S. 511 (1967), subsection (b)(4)'s recitation of uses that enable tribunals to make and effectuate judgments confirms that lawyers are afforded access to sensitive DMV information as officers of courts, not so they can solicit business.[5]

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[5] Evidence that legislators expected lawyers to use DMV information, Br. 43, does not show that Congress authorized use

2. Applying respondents' sweeping interpretation of "in connection with" to other subsections yields utterly implausible exceptions for insurance companies and private toll road operators. Op. Br. 41–44. Contrary to respondents' claim, Br. 55, there is a very "obvious reason why subsection (b)(6) must be read" to preclude insurance company use of personal information for solicitation: disclosure of DMV information for "us[e] *by insurers*, manufacturers, direct marketers, and others," *Condon*, 528 U.S. at 148 (emphasis added), was precisely what Congress sought to ban. And Congress rejected the argument that states—the very entities profiting from this practice—should regulate such use. By contrast, applying the narrowing presumption for exceptions and the *noscitur a sociis* principle limits subsection (b)(6) to use by insurance companies for "claims investigation and antifraud activities." 139 Cong. Rec. 29,468–69 (statement of Sen. Warner) (1993). Similarly, respondents assert that "it is not obvious" that their reading would allow private toll road operators to use DMV information to advertise the benefits of their roads, but they nowhere explain why such use is not captured by their capacious reading of subsection (b)(4).

Respondents attempt to tease a competing incongruity from subsection (b)(2), but this provision once again undermines their claims. If "in connection with" were all-encompassing, the further specification

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for solicitation, but simply confirms that the litigation exception is intended to facilitate proceedings. *See also* 139 Cong. Rec. 29,468 (1993) (statement of Sen. Boxer) (law "allows access for all governmental agencies, *courts*, and law enforcement personnel" (emphasis added)); 140 Cong. Rec. 7925 (1994) (statement of Rep. Moran) (law provides "access to personal information for *courts*, law enforcement, governmental agencies, and for other driver and automobile safety purposes" (emphasis added)).

of "survey research" would be unnecessary, as it would plainly be "in connection with" "market research activities." § 2721(b)(2). Thus, respondents' interpretation of "in connection with" renders subsection (b)(2)'s "including survey research" clause superfluous. Under petitioners' reading, by contrast, that clause is necessary to exempt these marketing surveys from subsection (b)(12)'s consent requirement.

3. Finally, although they deride petitioners' reading of subsection (b)(4) as "nebulous," Br. 55, respondents nowhere defend the lower court's "inextricably intertwined" test, or explain how DMV officials would apply their sweeping "in connection with" test. In fact, petitioners propose an entirely workable scheme: it permits uses of DMV information that promote the integrity and efficacy of proceedings—*e.g.*, by identifying and summoning potential jurors, identifying witnesses or evidence, or facilitating service of process or the provision of class notice.[6] The civil liability provisions effectively place the onus for compliance on requesting attorneys, and good-faith reliance on their representations shields DMV officials from liability.

Solicitation does not meet this test because, as this Court has repeatedly recognized, it is commercial activity, not activity undertaken as an officer of the courts. Indeed, this case vividly illustrates the distinction. By suing hundreds of defendants against whom their clients had no claim, respondents acted no differently than a lawyer who files a suit without

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[6] Such notice is materially different from solicitation; it informs absent class members that they have a right to file an individual action and that they will be bound by the judgment if they do not opt out. Such notice thus promotes the fairness of the proceedings and enables courts to render binding judgments.

any plaintiff, then uses DMV information to find one. Use of DMV information to remedy a standing defect *caused by an improper filing* does not further the integrity of the judicial proceedings; it encourages improper filings, and furthers the commercial interests of lawyers who use them to "fence out" other lawyers from a potentially large class action.[7]

Those filings did not obligate respondents to solicit plaintiffs who purchased from the improperly named dealers. And the content of their letters (not their mere labels) belies respondents' claim that they did not engage in "solicitation at all." Br. 58. The Fourth Circuit properly rejected that claim, Pet. App. 27a–28a, which falls outside the questions presented and was waived by respondents' failure to raise it in their brief in opposition, Op. Br. 18.

While baseless, respondents' back-door attempt to recast their activities as non-solicitation is telling. They complain about liability turning on fine distinctions, but their conduct reveals their understanding of this very distinction. None of their DMV requests, including those made after litigation began, stated that respondents sought information to solicit clients. Instead, they were couched as requests for information designed to further adjudicative processes. By failing to limit their use to those purposes, respondents violated the DPPA.

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[7] Contrary to respondents' ends-justify-the-means suggestion, Br. 14, the trial court did not find any violation of South Carolina law, but instead simply interpreted two terms in the relevant statute, JA 262.

CONCLUSION

The Court should reverse and remand.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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Petitioners,

v.

MICHAEL EUGENE SPEARS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF ELECTRONIC FRONTIER FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Electronic Frontier Foundation ("EFF") is a nonprofit, member-supported civil liberties organization working to protect privacy rights in a world of rapid technological change. As part of that mission, EFF actively encourages and challenges government and the courts to support privacy, and has served as counsel or *amicus curiae* in privacy cases before this Court, including *United States v. Jones*, 132 S. Ct. 945 (2012), *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), *National Aeronautics and Space Administration v. Nelson*, 131 S. Ct. 746 (2011), and *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

We live in an age of instant access to information. With the click of a mouse or the tap of a screen on a smartphone, we can find available hotel rooms in Moscow, determine the price of gold in Chile, or find every sushi restaurant within ten miles of our current location. In many ways, this access to information has made our lives easier. But there is another side to this wealth of information at our fingertips – much of our personal information is also now a click away. Information such as a person's criminal record, the purchase price of someone's house, or someone's bankruptcy filings is now instantly available

1. This brief is filed with the written consent of all parties. The parties' letters consenting to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than the amicus made a monetary contribution intended to fund the preparation or submission of this brief.

to everyone. Although such information may always have been somehow available, obtaining it required visits to the recorder of deeds or the county courthouse. The Internet has made this information *easily* accessible, as information brokers compile such information into readily searchable databases.

For many Americans, the information that we are required to provide to government agencies in order legally to own and operate a motor vehicle, our motor vehicle record ("MVR") information, is also available on the Internet. States require drivers to provide personal information, which "may include a person's name, address, telephone number, vehicle description, Social Security number, medical information, and photograph, as a condition of obtaining a driver's license or registering an automobile." *Reno v. Condon*, 528 U.S. 141, 143 (2000). Concerned about the dissemination of this information, Congress passed the Driver's Privacy Protection Act of 1994 (the "DPPA"), which imposes civil and criminal liability for disclosure of MVR information unless it comes within one of fourteen narrowly-defined "permissible uses." 18 U.S.C. §§ 2721-2724. Therefore, before an individual can obtain MVR information electronically, he or she must first identify one of the fourteen "permissible purposes" provided in Section 2721(b) of the DPPA for obtaining such information.

This Court has recognized the importance of providing individuals with the ability to control the dissemination of private information about them. *See Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989) ("[B]oth the common law and the literal understandings of privacy encompass the individual's

control of information concerning his or her person.") Yet, with three statutory exceptions,[2] the obtainment of MVR information is in no way controlled by the individual whose information is being obtained. Rather, the determination whether an individual's MVR information may be accessed under the DPPA is left solely to the individual requesting the information, who must self-determine whether he or she has one of the DPPA's permitted purposes that would entitle him or her to access the information. Indeed, in most instances, the individuals whose MVR information is obtained have no way of knowing that their information has been obtained.

The consequence of this cannot be overstated; the responsibility of maintaining the privacy of MVR information falls on the very individuals who wish to obtain the MVR information. It is inevitable that individuals seeking to obtain MVR information will, when faced with a nebulous standard such as the "inextricably intertwined" analysis adopted by the Fourth Circuit in this case, interpret such a standard in their own self-interest and therefore in favor of disclosure of such records. Such an interpretation is made more likely when the searches occur in the virtual anonymity of the Internet. To avoid this consequence, the DPPA should be interpreted exactly as it is drafted – so that a person with any non-permissible purpose is precluded from obtaining confidential MVR information. This interpretation not

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2. Sections 2721(b)(11) (for "any other use" not provided in Section 2721(b)), (b)(12) (for "bulk distribution for surveys, marketing or solicitations"), and (b)(13) (for "use by any requester") require the consent of the person to whom the information pertains to disclose such information, as discussed below. 18 U.S.C. § 2721(b)(11)-(13).

only would effectuate the purpose of the DPPA, but also would set forth a clear standard for individuals seeking to obtain MVR information, thereby protecting the privacy of the individuals whose personal information is sought.

ARGUMENT

I. CONGRESS HAS RECOGNIZED THE IMPORTANCE OF MAINTAINING THE PRIVACY OF MOTOR VEHICLE RECORDS IN LIGHT OF THE EASY ACCESS AFFORDED BY THE INTERNET.

In response to concerns about the access of stalkers and other criminals to MVR information, on the one hand, and the common practice of many states of selling motor vehicle records to businesses, marketers, and individuals, on the other hand, Congress enacted the DPPA in 1994 to restrict states' ability to disclose a driver's personal information without the driver's consent. *Reno v. Condon*, 528 U.S. at 144. As originally enacted, the DPPA allowed the disclosure of motor vehicle information for certain commercial uses, such as solicitation, unless the motorist "opted out" by expressly forbidding such disclosure. *Id.* However, in 1999, Congress amended Section 2721(b)(12) governing "bulk distribution for surveys, marketing or solicitations," to change it from an "opt-out" alternative to an "opt-in" requirement. *Id.* at 144-45. Motorists now no longer need to take any affirmative steps to protect the privacy of their information from being used for marketing or solicitation; rather, subsection 2721(b)(12) requires the express consent of the motorist before the protected information can be used for such purposes.

Congress also expanded the privacy protection under the DPPA in 2000 by adding a limitation on the disclosure of "highly restricted personal information" which is defined as "an individual's photograph or image, social security number, medical or disability information." 18 U.S.C. § 2725(4). Pursuant to Section 2721(a), states are not permitted to disclose this "highly restricted personal information" without the "express consent of the person to whom such information applied, except [for] uses permitted in subsections (b)(1), b(4), (b)(6), and (b)(9)." 18 U.S.C. § 2721(a)(2). In other words, an individual's "highly restricted personal information" cannot be obtained or used without that person's express consent unless the information is to be used for one of four specified DPPA permitted uses: by a government agency (§ 2721(b)(1)); in connection with litigation ((b)(4))[3]; by an insurer ((b)(6)); and by an employer to verify information relating to a holder of a commercial driver's license ((b)(9)).

These amendments to the DPPA manifest a clear Congressional intent to expand privacy protection by narrowing the exceptions in Section 2721(b). They were motivated at least in part by growing concern about the increasing availability of personal information on the Internet. For example, in discussing the proposed amendments in 1999, Senator Richard Shelby noted

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3. In full, Section 2721(b)(4) provides for the disclosure of MVR information "[f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court." 18 U.S.C. § 2721(b)(4).

that the Internet presented a threat to the privacy of individuals' MVR information requiring heightened protection of such information:

> My concern is that private information is too available. The proliferation of information over the Internet makes it easy and cheap for almost anyone to access very personal information.
>
> I think members would be shocked by what virtually anyone--including weirdos and stalkers--can find out about you, your wife, or your children with only a rudimentary knowledge of how to search the Internet.
>
> I believe that there should be a presumption that personal information will be kept confidential, unless there is compelling state need to disclose that information. Most states, however, readily make this information available, and because states sell this information, a lot of information about you effectively comes from public records.
>
> Section 350 of the conference protects personal information from broad distribution by requiring express consent prior to the release of information in two situations. First, individuals must give their consent before a state is able to release photographs, social security numbers, and medical or disability information. Of course, this excludes law enforcement and others acting on behalf of the government. Second, individuals must give their consent before the state can sell

> or release other personal information when that information is disseminated for the purpose of direct marketing or solicitations.

145 Cong. Rec. 23,699 (1999) (statement of Sen. Shelby). Magnifying the concerns articulated by Senator Shelby in 1999, MVR information is today even more widely available on the Internet.

II. PERSONAL INFORMATION FROM MOTOR VEHICLE RECORDS IS WIDELY AVAILABLE OVER THE INTERNET.

Courts have interpreted the DPPA to permit state departments of motor vehicles to sell MVR information in bulk to "aggregator" companies, which may then resell such information to third-parties. *See Taylor v. Acxiom Corp.*, 612 F.3d 325, 340 (5th Cir. 2010) (holding that "a person who buys DMV records in bulk does so for the purpose of making permissible actual use of information therein under *18 U.S.C. § 2721(b)*, even if that person does not actually use every single item of information therein" and that "the plain language of *18 U.S.C. § 2721* allows resale of DMV records."); *Cook v. ACS State & Local Solutions, Inc.*, 663 F.3d 989, 996 (10th Cir. 2011) (finding that state departments of motor vehicles may sell MVR information in bulk to companies who intend re-sell this information to third parties and that "[s]o long as personal information is ultimately used only for permitted purposes, it is not clear why Congress would have intended to regulate *who* could obtain it.") (emphasis in original). As a result, motor vehicle information is available through a broad range of websites on the Internet. For example, the

two major electronic research services used by the legal profession – Lexis and Westlaw – both make available MVR information.[4]

Specifically, current or historical[5] MVR information from thirty-four states is now available online through Lexis[6] and Westlaw:[7]

- Current MVR information is available on both Lexis and Westlaw for twenty (20) states and the District

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4. Lexis and Westlaw are provided as examples of companies that provide access to MVR Information over the Internet because they set forth the MVR Information that they make available by state. There are many other websites on the Internet which promise access to MVR Information, either for free or for a fee.

5. Those states for which "historical" MVR information is available are those that have suspended publication of motor vehicle records due to state imposed use restrictions. However, individuals' MVR information as of the time such restrictions went into effect continues to be available.

6. *See* LEXIS SOURCE INFORMATION – MOTOR VEHICLE REGISTRATIONS/TITLE, http://w3.nexis.com/sources/scripts/info.pl?314696 (last visited Nov. 13, 2012).

7. *See* WESTLAW DATABASE DIRECTORY – MOTOR VEHICLE RECORDS – COMBINED, http://weblinks.westlaw.com/result/default.aspx?action=Search&cnt=DOC&db=IDEN&elmap=Inline&eq=search&fmqv=s&fn=%5Ftop&method=WIN&mt=DUIPractitioner&n=31&origin=Search&query=dmv%2Dall&rlt=CLID%5FQRYRLT383049371014 11&rltdb=CLID%5FDB256584937101411&rlti=1&rp=%2Fsearch%2Fdefault%2Ewl&rs=IDEN3%2E0&scxt=WL&service=Search&sp=SEARCHIDEN%2D001&srch=TRUE&ss=CNT&sskey=CLID%5FSSSA416584937101411&sv=Split&tnprpdd=None&tnprpds=TaxNewsFIT&utid=%7B2BCD41B2%2D1E84%2D4EA1%2DAFAE%2DA7E878E07CC6%7D&vr=2%2E0 (last visited Nov. 13, 2012).

of Columbia: Colorado, the District of Columbia, Florida, Illinois, Kentucky, Louisiana,[8] Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada,[9] North Dakota, Ohio, Tennessee, Texas, Wisconsin, and Wyoming

- Historical MVR information is available on both Lexis and Westlaw for six (6) states: Alabama, Alaska, Connecticut, Idaho, Maryland, and Utah

- Historical MVR information is available on Lexis while no MVR information is available on Westlaw for four (4) states: Delaware, North Carolina, Oklahoma, and South Carolina

- No MVR information is available on Lexis while historical MVR information is available on Westlaw for one (1) state: Iowa

- No MVR information is available on Lexis while current MVR information is available on Westlaw for one (1) state: New Mexico

- Historical MVR information is available on Lexis while current MVR information is available on Westlaw for one (1) state: New York

- No MVR information is available on either Lexis or Westlaw for seventeen (17) states: Arizona,

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8. Louisiana data received after September 2012 does not contain license plate information.

9. License plate numbers are not available from Nevada.

Arkansas, California, Georgia, Hawaii, Indiana, Kansas, New Hampshire, New Jersey, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, and West Virginia

The information about each motor vehicle owner typically available in these databases includes the owner's name and address; the make, model and year of the vehicle; the vehicle's license plate number and state; the vehicle identification number; and title information about the vehicle.[10]

Through an initial motor vehicle search, an individual is able to obtain identifying information about the vehicle's owner. Moreover, because of the ability of data brokers to consolidate reports from multiple sources, this identifying information may also be used to obtain information about the motor vehicle owner's bankruptcy filings, concealed weapons permits, criminal records, employment, foreclosures, hunting and fishing licenses, judgments and liens, real property, sexual offender status, and voter registration. Therefore, with only a license plate number, an individual may obtain a wealth of private information about the owner of a motor vehicle.[11]

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10. *See* footnotes 6 and 7, *supra*, for citations to the MOTOR VEHICLE REGISTRATIONS/TITLE directory on Lexis and the MOTOR VEHICLE RECORDS – COMBINED directory on Westlaw.

11. See, e.g., PEOPLEPUBLICRECORDS.ORG, http://www.peoplepublicrecords.org/index.php?xpath=dmv (last visited Nov. 15, 2012) (explaining that "PeoplePublicRecords.org is the leading provider of online DMV records, allowing you the convenience of accessing thousands of public and private data sources instantly from the comfort of home. Find the precise driving records you're searching for, and enjoy a *complete background report*

The limiting factor on this access, of course, is the DPPA. Although this case concerns MVR information that was obtained through a Freedom of Information Act request rather than electronically, the ease with which MVR information is available electronically presents heightened privacy concerns that require the attention of the Court in interpreting the DPPA.[12]

III. THE DPPA SHOULD BE INTERPRETED TO PROVIDE THAT A PERSON WHO OBTAINS PERSONAL INFORMATION FROM A MOTOR VEHICLE RECORD FOR A PURPOSE NOT PERMITTED IS LIABLE TO THE INDIVIDUAL TO WHOM THE INFORMATION PERTAINS EVEN IF THE PERSON OBTAINING THE INFORMATION ALSO HAS A PERMISSIBLE PURPOSE.

In 1999, Senator Shelby articulated a concern that is even more relevant today – the proliferation of personal MVR information available over the Internet. Yet the Fourth Circuit has failed to give effect to the amendments that were adopted by Congress, at least in part, to address this issue. The Fourth Circuit did not limit individuals engaging in solicitation to obtaining the personal information of only those persons who had provided express consent to the release of their information.

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about anyone you choose using the power of the Internet. Using information from the DMV records, you can *easily search by license plate number.*") (Emphasis added).

12. For example, in *Pichler v. UNITE*, 585 F.3d 741 (3d Cir. 2009), the defendant had conducted "approximately 13,700 motor vehicle searches on Westlaw." *Id.* at 743.

Moreover, even though the litigation exception provides access to "highly restricted personal information" which Congress intended to protect, the Fourth Circuit found that it was permissible pursuant to that exception for attorneys engaged in the solicitation of legal business to obtain the personal information of 34,000 individuals – information that was subsequently filed with the South Carolina Office of Disciplinary Counsel and thereby made available to the public. *See* CA4 JA 484.

"The starting point in every case involving construction of a statute is the language itself." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). Section 2724(a) of the DPPA provides: "A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, *for a purpose not permitted* under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action." 18 U.S.C. § 2724(a) (emphasis added). This civil liability provision of the DPPA does not provide that a person with a permissible purpose is not liable; rather it provides that a person with an *im*permissible purpose *is* liable. Here, even if the Respondents ("Lawyers") had obtained information for a purpose permissible under Section 2721(b)(4), such as an investigation of a client's claims,[13] such a use does not excuse their failure to comply with

13. For the reasons set forth in Petitioners' Brief, the DPPA's litigation exception should not be interpreted to afford lawyers *carte blanche* to use MVR information to identify and solicit potential clients.

the DPPA's requirements for use in connection with bulk marketing and solicitation. There is no question that the Lawyers obtained MVR information of numerous South Carolina residents and engaged in solicitation of those individuals. *See Maracich v. Spears*, 675 F.3d 281, 293 (4th Cir. 2012) ("viewed objectively, the mailings constituted 'solicitations.'") Moreover, the Lawyers do not contend that the individuals whom they solicited had provided express consent to the South Carolina Department of Motor Vehicles that their MVR information could be disclosed for purposes of solicitation, as required by Section 2721(b)(12). Therefore, the Lawyers obtained the MVR information "for a purpose not permitted" by the DPPA and they should be held liable pursuant to its express terms.

The Fourth Circuit properly recognized that the DPPA "makes unlawful 'any use not permitted' in [Section 2721(b)]." *Id.* at 297. Nevertheless, the Fourth Circuit rejected this "absolute rule," and instead, "without undertaking to lay down a rule applicable in all future cases," *id.* at 294, held that "conduct that might, prima facie, amount to prohibited solicitation (i.e., that prohibited absent express consent) leading to a disclosure of personal information, does not give rise to a cognizable claim under the DPPA when such use in solicitation is coextensive with, and inextricably intertwined with, conduct expressly permitted pursuant to the litigation exception." *Id.* at 298. Yet there is nothing in the DPPA that permits a court to balance or determine the relatedness of the various permitted and non-permitted uses; instead, the court evaluating the purpose or purposes of the party who obtained the MVR information need only determine whether the defendant has an impermissible purpose.

See United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (where "the statute's language is plain, the sole function of the courts is to enforce it according to its terms."). In *Pichler v. UNITE*, 542 F.3d 380 (3d Cir. 2008), the Third Circuit adopted this construction, finding that it was irrelevant whether the defendant's efforts fell within the litigation exception and holding that "[b]ecause UNITE obtained and used the confidential information for an impermissible purpose – union organizing – it does not matter what other permissible purpose UNITE may have had." *Id.* at 395.

Moreover, the Fourth Circuit's finding that the Lawyers' solicitation of clients was permissible because it was "inextricably intertwined with their intended permitted use of the personal information they obtained," *Maracich*, 675 F.3d at 297, presents an amorphous standard that threatens to undo the protections of individuals' MVR information set forth in the DPPA. This standard leaves both courts enforcing the DPPA and individuals seeking MVR information in the unenviable position of determining when a non-permitted use is "inextricably intertwined" with a permitted use under the DPPA.

In the context of the electronic availability of individuals' MVR information, gatekeeper sites like Lexis and Westlaw merely request that the user indicate a permitted purpose – there is no reference to what happens if the individual also has a non-permitted purpose. The result is that these websites have adopted a *de facto* standard that the presence of any permissible purpose is sufficient to sell access to MVR information. This *de facto* standard is not consistent with the Fourth

Circuit's "inextricably intertwined" standard, which necessarily implies that a non-permitted purpose that is not "inextricably intertwined" with a permitted purpose would violate the DPPA. Nor is it consistent with the DPPA itself, which provides that a person seeking motor vehicle records with an impermissible purpose is liable. Because the DPPA contains no language that would excuse an impermissible purpose merely because it was undertaken in conjunction with a permissible purpose, the Court should uphold the DPPA's express provision that an individual is liable "who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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BRIEFS

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IN THE

Supreme Court of the United States

EDWARD F. MARACICH, ET AL.,

Petitioners,

v.

MICHAEL EUGENE SPEARS, ET AL.,

Respondents.

**On Writ of Certiorari to
The United States Court of Appeals
For the Fourth Circuit**

BRIEF OF *AMICUS CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND TWENTY-SEVEN TECHNICAL EXPERTS AND LEGAL SCHOLARS IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.[1]

EPIC routinely participates as *amicus curiae* before this Court and other courts in cases concerning federal privacy statutes: *FAA v. Cooper*, 132 S. Ct. 1441 (2012); *First Am. Fin. Corp. v. Edwards*, 610 F.3d 514 (9th Cir. 2010), *cert. denied as improvidently granted*, 132 S. Ct. 2536 (2012); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *NASA V. Nelson*, 131 S. Ct. 746 (2011); *Flores-Figueroa v. United States*, 556 U.S. 646 (2009); *Doe v. Chao*, 540 U.S. 614 (2003); *Gordon v. Softech Int'l, Inc.*, No. 10-5162, 2011 WL 1795300, *appeal docketed*, No. 12-0661 (2nd Cir. 2012); *In re Google Inc. St. View Commn'cs*, 794 F. Supp. 2d 1067 (N.D. Cal. 2011), *appeal docketed*, *Ben Joffe v. Google*, No. 11-17483 (9th Cir. Oct. 17, 2011); *Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2010); *SEC v. Rajaratnam*, 622 F.3d 159 (2nd Cir. 2010); *NCTA v. FCC*, 555 F.3d 996

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party. EPIC Appellate Advocacy Fellow David Brody contributed to this brief.

(D.C. Cir. 2009); *Am. Bankers Ass'n v. Gould*, 412 F.3d 1081 (9th Cir. 2005); *United States v. Councilman*, 418 F.3d 67 (5th Cir. 2005); *Kehoe v. Fidelity Bank & Trust*, 421 F.3d 1209 (7th Cir. 2005).

EPIC has a particular interest in ensuring the effective enforcement of federal statutes that seek to protect the privacy of personal information. EPIC submitted an *amicus* brief in *Reno v. Condon*, 528 U.S. 141 (2000), in which we argued that "[t]he Drivers Privacy Protection Act safeguards the personal information of licensed drivers from improper use or disclosure. It is a valid exercise of federal authority in that it seeks to protect a fundamental privacy interest."

The EPIC amicus brief is joined by twenty-seven technical experts and legal scholars.

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SUMMARY OF THE ARGUMENT

The Driver's Privacy Protection Act of 1994 ("DPPA") protects the privacy of personal information. The Act prohibits the disclosure, except in narrow circumstances, of the information individuals are required by law to provide in order to obtain identification documents, drivers licenses, and

automobile titles. The improper release and misuse of this information creates a significant risk of harm to individuals.

The amount of personal information, including authenticating documents used to establish identity, obtained by state departments of motor vehicles ("DMVs") is staggering and has increased over time. The Department of Homeland Security ("DHS") now requires DMVs to collect and store detailed personal information, sensitive identifying documents, and biometric data. The records also contain Social Security numbers ("SSNs"), which are the key to identity theft, a top concern of American consumers.

The DPPA provides for disclosure of motor vehicle records for certain limited purposes. An expansive reading of any of those exceptions, including the "litigation" exception, would be inconsistent with the Act's goal of protecting personal information. Changes in technology have increased the risk of the underlying harm that Congress sought to address. Therefore, the Court should narrowly construe the statutory exceptions.

ARGUMENT

The Driver's Privacy Protection Act of 1994 ("DPPA"), 18 U.S.C. §§ 2721-2725, was enacted to protect individuals from the harm caused by misuse and unauthorized disclosure of the personal information they provide to state agencies that maintain motor vehicle records. The DPPA protects Americans from both physical[2] and financial[3] harms. In addition, the DPPA provides important limits on the collection and use of personal information by data brokers. *See* Sasha Romanosky & Alessandro Acquisti, *Privacy Costs and Personal Data Protection: Economic and Legal Perspectives*, 24 Berkeley Tech. L. J. 1061, 1061 (2009).

At issue in this case is the interpretation of a particular exception in the Act. 18 U.S.C. § 2721(b)(4).[4] *Amici* EPIC, technical experts, and legal

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[2] Such as that suffered by Rebecca Schaeffer, who was murdered prior to the passage of the Act by a man who had obtained her home address from the California DMV. *See* 139 Cong. Rec. S15,761 (daily ed. Nov. 16, 1993) (statement of Sen. Barbara Boxer, a sponsor of the Act).

[3] Such as that suffered by individuals in Oregon recently victimized by a criminal who obtained a portion of the DMV database. *See* Natalie Brand, *Police Say Convicted Felon Charged with 50 Counts of ID Theft*, Fox Oregon (Mar. 24, 2012).

[4] The full text of that provision states:

> (4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of

scholars urge the Court to narrowly construe this exception and other such exceptions in federal privacy statutes. The records protected by the DPPA include the personal information used to authenticate identity as well as copies of the identifying documents themselves. *See infra* Part I. Identity thieves target this information maintained by the state agencies. *See infra* Part II.A. Data brokers use the data that individuals are required to provide to the state to create secret profiles. *See infra* Part II.B.

In order to safeguard the privacy of Americans, the Act's statutory exceptions should be interpreted narrowly and the definition of "personal information" should be interpreted broadly. *See infra* Part III.

I. State DMVs Collect Detailed, Sensitive Personal Information

State departments of motor vehicles ("DMVs") collect personal information from millions of Americans. At the time the DPPA was enacted, the DMV's collected names, addresses, and other identifying information. Following the enactment of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005), states collected even more information, including Social Security numbers ("SSNs") and biometric data.

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litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

A. When the DPPA Was Enacted, Motor Vehicle Records Contained a Wide Range of Personal Information

When Congress passed the DPPA in 1994, state DMVs already collected a significant amount of personal information. As the Court noted in *Reno v. Condon*, 528 U.S. 141 (2000):

> State DMVs require drivers and automobile owners to provide personal information, which may include a person's name, address, telephone number, vehicle description, Social Security number, medical information, and photograph, as a condition of obtaining a driver's license or registering an automobile.

Id. at 143. Congress was understandably concerned about unrestricted access to this detailed personal information.[5] As the Court further explained:

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[5] "Random access to personal information contained in DMV files poses a threat to every licensed driver in the Nation. In my own State of Virginia, over 127,815 requests are made every year for personal information contained in motor vehicle files. In Virginia, like most other States, licensees are not notified that their personal information has been accessed." 139 Cong. Rec. E2747 (daily ed. Nov. 3, 1993) (statement of Rep. James Moran, a sponsor of the Act). "[The DPPA] applies to auto titles, to car registrations, to driver's licenses, auto tags -- all this is open. There is a war in this country to fight for privacy. People are now fighting, and this [Act] is coming to their assistance to provide the privacy, which I and many others thought existed." 139 Cong. Rec. S15,764 (daily ed. Nov. 16, 1993) (statement of Sen. John Warner, a sponsor of the Act).

> The DPPA establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent. The DPPA generally prohibits any state DMV, or officer, employee, or contractor thereof, from "knowingly disclosing or otherwise making available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. § 2721(a).

Id. at 143.

After initial passage, and aware of the growing concern about the sale of personal information by DMVs, Congress amended the Act to require express consent to solicitation. *See* Pub. L. No. 106-69, 113 Stat. 986, §§ 350(c), (d), and (e) (1999).[6] As the Court further explained in *Reno*, "Under the amended DPPA, States may not imply consent from a driver's failure to take advantage of a state-afforded opportunity to block disclosure, but must rather obtain a driver's affirmative consent to disclose the driver's personal information for use in surveys, marketing, solicitations, and other restricted purposes. *Reno*, 528 U.S. 144-45.

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[6] The author of the amendment said that "there should be a presumption that personal information will be kept confidential, unless there is compelling state need to disclose that information." 145 Cong. Rec. 23,699 (Oct. 4, 1999) (statement of Sen. Richard Shelby).

But today the amount of personal information collected by the state agencies is simply staggering. According to Department of Homeland Security ("DHS") regulations, state departments of transportation, and the American Association of Motor Vehicle Administrators,[7] the information held by DMVs includes:

- full names,[8]
- dates of birth,[9]
- gender,[10]
- driver's license numbers,[11]
- digital photos (often used with facial recognition technology),[12]

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[7] The American Association of Motor Vehicle Administrators ("AAMVA") is a nonprofit organization that works closely with state and federal agencies to develop programs and standards for motor vehicle administration. Agencies often adopt these programs and standards directly into their regulatory regimes.

[8] *See e.g.* REAL ID Driver's Licenses and Identification Cards, 6 C.F.R. § 37.17(a) (2008). In accordance with the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005), DHS issued a final rulemaking setting national standards for driver's licenses and identification cards. DHS's REAL ID rules have been finalized, but full compliance is not required until Jan. 15, 2013. 6 C.F.R. § 37.51 (2011).

[9] 6 C.F.R. § 37.17(b) (2008); *id.* at § 37.11(d).

[10] *Id.* at § 37.17(c).

[11] *Id.* at § 37.17(d).

[12] *Id.* at § 37.17(e). Even if a DMV does not issue a license, the regulations require the state to keep the photo on file for at least five years. *Id.* at § 37.11(a)(1). Thirty-eight jurisdictions use facial recognition technology. Am. Assoc. of Motor Vehicle Admin., *Biometrics in AAMVA Community* (2012), *available at*

- iris data,[13]
- addresses,[14]
- signatures,[15]
- SSNs,[16]
- copies of passports,[17]
- copies of birth certificates,[18]
- citizenship status and immigration documentation,[19]
- W-2 and 1099 tax records,[20]
- height,[21]

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http://www.aamva.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=2497&libID=2483.

[13] 6 C.F.R. § 37.17(e)(iii) (2008); *Id.* at § 37.17(e)(iv). Irises contain biometric data that can be used to identify an individual.

[14] *Id.* at § 37.17(f); *id.* at § 37.11(f).

[15] *Id.* at § 37.17(g). Signatures contain biometric data about an individual's handwriting.

[16] *Id.* at § 37.11(e). Under the REAL ID program, driver's license applicants must submit SSNs to verify their identity.

[17] *Id.* at § 37.11(c)(i). Passports are used for identity and citizenship verification.

[18] *Id.* at § 37.11(c)(ii). Birth certificates are used for identity and citizenship verification. *See also* Fl. Dep't of Highway Safety and Motor Vehicles, *If You Do Not Have a Social Security Number*, http://www.gathergoget.com/SSN.aspx (last accessed Nov. 12, 2012) [hereinafter Fl. DMV, *SSN Alternatives*].

[19] 6 C.F.R. § 37.11(c)(iii)-(viii) (2008); *id.* at § 37.11(g). The REAL ID program requires applicants to prove that they are in the U.S. legally in order to obtain a driver's license or identity card.

[20] *Id.* at § 37.11(e)(i)-(ii). In the absence of a Social Security card, these documents are used to prove identity.

- eyesight,[22]
- place of birth,[23]
- weight,[24]
- military status,[25]

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[21] Am. Assoc. of Motor Vehicle Admin., *Personal Identification - AAMVA North American Standard - DL/ID Card Design* 10 (June 2012), *available at* http://www.granddriver.info/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=2458&libID=2444 [hereinafter *DL/ID Card Design 2012*].

[22] *Id.* at 10. Eyesight is typically measured to determine if a driver must be restricted to wearing corrective glasses or lenses while driving. Such restrictions are then noted on the license. *See, e.g.* Minn. Dep't of Pub. Safety, *Just the Facts: New to Minnesota* (Aug. 2012), *available at* https://dps.mn.gov/divisions/dvs/forms-documents/Documents/NewResident.pdf; N.Y. Dep't Motor Vehicles, *Original Driver License* (Apr. 2011), *available at* http://www.dmv.ny.gov/forms/ccrp1.pdf [hereinafter N.Y. DMV, *Original Driver License*] (describing eye test requirement); Fl. Dep't of Highway Safety and Motor Vehicles, *Report of Eye Exam* (June 2011), *available at* http://www.flhsmv.gov/hsmvdocs/vision.pdf.

[23] *DL/ID Card Design 2012*, *supra* note 21, at 11.

[24] *Id.* at 12.

[25] *Id.* at 14. Some jurisdictions may list veteran status on a driver's license or give special registrations to active duty service members. Military orders or documentation are also used for identity and residency verification. *See, e.g.* Ala. Dep't of Pub. Safety, *Document Requirements And Fees* (2012), http://dps.alabama.gov/Home/wfContent.aspx?ID=30&PLH1=plhDriverLicense-DocumentRequirementsAndFees#ID; Colo. Dep't of Revenue, *Identification Requirements* (Apr. 27, 2011), *available at* http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251714422992&ssbinary=true; Minn. Dep't of Pub.

- radio frequency identification device ("RFID") data from enhanced driver's licenses,[26]
- fingerprints,[27]
- driver accident records,[28]
- traffic violations,[29]
- DUI convictions,[30]
- child support violations,[31]

Safety, *Identification Requirements* (Aug. 2012), *available at* https://dps.mn.gov/divisions/dvs/forms-documents/Documents/IdentificationRequirements_English.pdf; S.C. Dep't of Motor Vehicles, *United States Citizens Checklist for First Time Issuance of Driver's License, Beginner's Permit, and Identification Cards* (Mar. 2012), *available at* http://www.scdmvonline.com/DMVNew/forms/MV-93.doc [hereinafter S.C. DMV, *Checklist*]; N.Y. Dep't. of Motor Vehicles, *Proofs of Identity* (Oct. 2011), *available at* http://www.dmv.ny.gov/forms/id44.pdf [hereinafter N.Y. DMV, *Proofs of Identity*] (listing types of documents acceptable to prove identity); Fl. Dep't of Highway Safety and Motor Vehicles, *Titles & Registrations for Military Members* (2008), http://www.flhsmv.gov/dmv/forms/miltitle.html [hereinafter Fl. DMV, *Military Registrations*].

[26] *DL/ID Card Design 2012*, *supra* note 21, at 93-97. Four jurisdictions use RFID: Michigan, New York, Vermont, and Washington. Am. Assoc. of Motor Vehicle Admin., *US License Technology* (June 2011), *available at* http://www.aamva.org/ID-Security-Technologies/.

[27] Nine jurisdictions currently collect fingerprints. *Biometrics in AAMVA Community*, *supra* note 12.

[28] REAL ID Driver's Licenses and Identification Cards, 6 C.F.R. § 37.33(a)(4) (2008). *See also, e.g.* N.Y. Dep't. of Motor Vehicles, *Abstract of Driving Record* (Feb. 2012), *available at* http://www.dmv.ny.gov/forms/ds2421.pdf.

[29] *Id.*

[30] *Id.*

- court documents and pending prosecutions,[32]
- medical and mental health records,[33]
- vehicle title information and vehicle identification number ("VIN"),[34]

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[31] *See, e.g.*, N.Y. Dep't. of Motor Vehicles, *Abstract of Driving Record*, *supra* note 28.

[32] *See, e.g.*, Ala. Dep't of Pub. Safety, *Star ID: Document List* (2012), http://dps.alabama.gov/Home/wfContent.aspx?ID=80&PLH1=plhDriverLicense-StarIDDocumentList; Colo. Dep't of Revenue, *Exception Processing* (2012), http://www.colorado.gov/cs/Satellite?c=Page&cid=1206604921186&pagename=Revenue-MV%2FRMVLayout; N.Y. Dep't. of Motor Vehicles, *Abstract of Driving Record*, *supra* note 28

[33] Medical and mental health evaluations that pertain to a driver's ability to operate a motor vehicle can form part of a person's motor vehicle record. *See, e.g.* Colo. Dep't of Revenue, *Exception Processing*, *supra* note 32; Minn. Dep't of Pub. Safety, *Just the Facts: Medical Conditions & Your Driver's License* (May 2011), *available at* https://dps.mn.gov/divisions/dvs/forms-documents/Documents/MedicalConditions_and_YourLicense.pdf ; N.Y. Dep't. of Motor Vehicles, *Physician's Reporting Form* (Dec. 2010), *available at* http://www.dmv.ny.gov/forms/ds6.pdf; Fl. Dep't of Highway Safety and Motor Vehicles, *Medical Reporting Form* (May 2012), *available at* http://www.flhsmv.gov/forms/72190.pdf.

[34] *See, e.g.* Minn. Dep't of Pub. Safety, *Just the Facts: New to Minnesota*, *supra* at note 22; Nat'l Motor Vehicle Title Info. Sys., *Consumer Access Product Disclaimer* (June 21, 2012), *available at* http://www.vehiclehistory.gov/CAPDisclaimer062112.pdf [hereinafter NMVTIS, *Consumer Access Product Disclaimer*]. The National Motor Vehicle Title Information System ("NMVTIS") serves as a nationwide electronic database of vehicle information, linking together state DMVs. *See also* Am. Assoc. of Motor Vehicle Admin., *State Vehicle Record Requests* (July 31, 2012) *available at* http://www.aamva.org/workarea/downloadasset.aspx?id=2701.

- vehicle history (including prior owners' personal information),[35]
- liens on car titles,[36]
- location data from vehicle smart cards,[37]
- license plate numbers,[38]
- vehicle and homeowner insurance information,[39]
- utility bills,[40]

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[35] *See, e.g.*, NMVTIS, *Consumer Access Product Disclaimer*, *supra* note 34.

[36] *See, e.g.*, Minn. Dep't of Pub. Safety, *Just the Facts: New to Minnesota*, *supra* at note 22; NMVTIS, *Consumer Access Product Disclaimer*, *supra* note 34.

[37] *See, e.g.* Am. Assoc. of Motor Vehicle Admin., *ID Security Technologies: Smart Cards*, *available* at http://www.aamva.org/ID-Security-Technologies/ (last accessed Nov. 9, 2012). Smart cards used for tollbooth fee collection, such as the E-Z Pass used in the northeastern United States, use RFID transmitters with unique identifiers to record every time a specific vehicle passes through a tollbooth. Such records include both the time and location of each fee collected. In 2011, E-Z Pass transponders were used in 2.4 billion tollbooth transactions. E-Z Pass Group, *E-Z Pass Data 2005-2011* (2011), *available at* http://www.e-zpassiag.com/about-us/statistics.

[38] *See, e.g. State Vehicle Record Requests*, *supra* note 34.

[39] See, e.g. Ala. Dep't of Pub. Safety, *Star ID: Document List* , *supra* note 33; Colo. Dep't of Revenue, *Identification Requirements*, *supra* note 26; NMVTIS, *Consumer Access Product Disclaimer*, *supra* note 34; N.Y. Dep't Motor Vehicles, *Request for Insurance Information for NY Registrants Involved in An Accident* (Mar. 2011), available at http://www.dmv.ny.gov/forms/fs25.pdf.; N.Y. Dep't Motor Vehicles, *Proofs of Identity, U.S. Citizenship and NYS Residence* (Apr. 2011), available at http://www.dmv.ny.gov/forms/id44edl.pdf [hereinafter N.Y. DMV, *Proofs of ID - EDL*] (homeowner's/renter's insurance used to establish residency); S.C. DMV, *Checklist*, *supra* note 26.

- welfare, Medicaid, and food stamp records,[41]
- firearms permits,[42]
- professional licenses,[43]
- Native American tribal affiliations,[44]
- college and high school records,[45]
- union affiliation,[46]

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[40] Utility bills are often used to establish identity and residency. *See, e.g.* Ala. Dep't of Pub. Safety, *Star ID: Document List* , *supra* note 32; Colo. Dep't of Revenue, *Identification Requirements*, *supra* note 25; N.Y. DMV, *Proofs of Identity*, *supra* note 25. REAL ID requires states to keep copies of documents used in driver's license or identity card applications for seven to ten years, depending on format. REAL ID Driver's Licenses and Identification Cards, 6 C.F.R. § 37.31(a) (2008) (describing source document retention).

[41] *See, e.g.* N.Y. DMV, *Proofs of Identity*, *supra* note 25; S.C. DMV, *Checklist*, *supra* note 26. Welfare, Medicaid, and food stamp documentation can be used to establish identity.

[42] Firearms permits, because they are issued by the state, are useful for establishing identity. Fl. DMV, *SSN Alternatives*, *supra* note 18; Minn. Dep't of Pub. Safety, *Identification Requirements* (Aug. 2012), *supra* note 25; N.Y. DMV, *Proofs of Identity*, *supra* note 25; S.C. DMV, *Checklist*, *supra* note 25.

[43] *See, e.g.* N.Y. DMV, *Proofs of Identity*, *supra* note 25; S.C. DMV, *Checklist*, *supra* note 25. Other types of state-issued licenses are useful for establishing identity.

[44] Tribal ID cards are used to prove identity. *See, e.g.*, Minn. Dep't of Pub. Safety, *Identification Requirements* (Aug. 2012), *supra* note 25; N.Y. DMV, *Proofs of Identity*, *supra* note 25.

[45] New York requires college and high school students to submit transcripts or report cards in addition to school ID cards. *Id. See also* Ala. Dep't of Pub. Safety, *Document Requirements And Fees*, *supra* note 25; Colo. Dep't of Revenue, *Identification Requirements*, *supra* note 26; Fl. DMV, *SSN Alternatives*, *supra* note 18; Minn. Dep't of Pub. Safety, *Identification Requirements* (Aug. 2012), *supra* note 25; S.C. DMV, *Checklist*, *supra* note 25.

- health insurance documentation,[47]
- life insurance documentation,[48]
- banking and credit card records,[49]
- marriage licenses and divorce records,[50]
- deeds, mortgages, and rental leases,[51]
- nursing home documentation,[52]

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[48] *See, e.g.* N.Y. DMV, *Proofs of Identity*, *supra* note 25. Union cards are used to prove identity

[47] Health insurance cards are used to prove identity. *See, e.g.*, Ala. Dep't of Pub. Safety, *Document Requirements And Fees*, *supra* note 25; Colo. Dep't of Revenue, *Exception Processing*, *supra* note 32; N.Y. DMV, *Proofs of Identity*, *supra* note 25; S.C. DMV, *Checklist*, *supra* note 25.

[48] Life insurance policies are used to prove identity. *See, e.g.*, N.Y. DMV, *Proofs of Identity*, *supra* note 25. *See also* Fl. DMV, *SSN Alternatives*, *supra* note 18.

[49] Bank statements, cancelled checks, ATM cards, and credit cards can be used to establish identity. *See, e.g.*, Colo. Dep't of Revenue, *Identification Requirements*, *supra* note 26; N.Y. DMV, *Proofs of Identity*, *supra* note 25; S.C. DMV, *Checklist*, *supra* note 25.

[50] Marriage and divorce records are used to establish identity and to change one's surname on an existing license. *See, e.g.*, Ala. Dep't of Pub. Safety, *Document Requirements And Fees*, *supra* note 25; Colo. Dep't of Revenue, *Exception Processing*, *supra* note 32; Minn. Dep't of Pub. Safety, *Identification Requirements* (Aug. 2012), *supra* note 25; N.Y. DMV, *Proofs of Identity*, *supra* note 25.

[51] Property records are used to establish residency. *See, e.g.* Ala. Dep't of Pub. Safety, *Star ID: Document List* , *supra* note 33; Colo. Dep't of Revenue, *Identification Requirements*, *supra* note 26; N.Y. DMV, *Proofs of Identity – EDL*, *supra* note 18; S.C. DMV, *Checklist*, *supra* note 25.

[52] A nursing home or assisted living statement can be used to establish residency. *See, e.g.*, N.Y. DMV, *Proofs of Identity – EDL*, *supra* note 18.

- jury duty records,[53]
- property tax receipts,[54]
- voter registration documentation,[55]
- Selective Service records,[56]
- religious affiliation records,[57]
- internet protocol (IP) addresses used to log on to DMV websites,[58]

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[53] Jury duty summons can be used to establish residency. *Id.*

[54] Property tax receipts can be used to establish residency. *Id.*

[55] Voter registration cards can be used to establish residency or identity. *See, e.g.*, Ala. Dep't of Pub. Safety, *Star ID: Document List , supra* note 33; Colo. Dep't of Revenue, *Voter Registration* (2012), http://www.colorado.gov/cs/Satellite/Revenue-MV/RMV/1211361061109; Fl. DMV, *SSN Alternatives, supra* note 18; N.Y. DMV, *Proofs of Identity – EDL, supra* note 18. Forty-four jurisdictions participate in the Help America Vote Verification ("HAVV") program, which uses motor vehicle records to verify voter registration information. Am. Assoc. of Motor Vehicle Admin., *Help America Vote Verification (HAVV) - Participants*, http://www.aamva.org/HAVV/ (last accessed Nov. 12, 2012).

[56] Selective Service draft cards can be used to establish residency or identity. *See, e.g.* Ala. Dep't of Pub. Safety, *Document Requirements And Fees, supra* note 25; Fl. DMV, *SSN Alternatives, supra* note 18; N.Y. DMV, *Proofs of Identity – EDL, supra* note 18.

[57] Baptism certificates and family bible records can be used to verify identity. See, e.g. Colo. Dep't of Revenue, *Exception Processing, supra* note 32; Fl. DMV, SSN Alternatives, supra note 18.

[58] *See, e.g.* Mass. Dep't. of Trans. Registry of Motor Vehicles, *Driving Record : User Agreement* (2012), https://secure.rmv.state.ma.us/DrvRecords/Intro.aspx (proceed to User Agreement via "Continue" button). The Massachusetts Registry of Motor Vehicles (RMV) collects the Internet Protocol ("IP") addresses of those who request their driving record

- adoption records,[59]
- felon or parolee identification documents,[60]
- records of homelessness or domestic violence,[61]
- location data from red light cameras,[62] and
- location data from license plate readers.[63]

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through the RMV's website. The RMV matches the IP addresses with personally identifiable information when reasonable for a criminal investigation or public safety. *See also* Cal. Dep't of Motor Vehicles, *Conditions* (2011), http://www.dmv.ca.gov/portal/portal/conditions.htm (outlining conditions of using the CA DMV website, including collection of IP addresses).

[59] *See, e.g.*, Ala. Dep't of Pub. Safety, *Document Requirements And Fees*, *supra* note 25; Minn. Dep't of Pub. Safety, *Identification Requirements* (Aug. 2012), *supra* note 25.

[60] *See, e.g.*, Ala. Dep't of Pub. Safety, *Document Requirements And Fees*, *supra* note 25; Colo. Dep't of Revenue, *Identification Requirements*, *supra* note 26; S.C. DMV, *Checklist*, *supra* note 25.

[61] *See, e.g.*, S.C. DMV, *Checklist*, *supra* note 25.

[62] Red light camera pictures reveal the specific time, date, and location of an individual. *See, e.g.*, *Wemhoff v. D.C.*, 887 A.2d 1004 (D.C. Ct. App. 2005).

[63] License plate readers record time, date, and location when they scan an individual's plate. *See, e.g.*, City of Beverly Hills, *ALPR Mobile Camera Systems / Multiple System Option: Legal Notice - Bids Wanted*, at 11 (Oct. 22, 2012), *available at* http://www.beverlyhills.org/cbhfiles/storage/files/13484565192620141 21/ALPRFixedSiteBid2-1MulticameraSystemPDFcopy.pdf (requesting bids for a mobile camera system that can "cross-link license plate data from external systems, such as DMV records"); Press Release, Va. Dep't of Motor Vehicles, Plate Readers Offer Advanced Inspection System for Trucks (Feb. 22, 2012), *available at*

After collecting personal information through DMVs, state and federal agencies pool motor vehicle records for inter-jurisdictional use. Some programs create national databases of motor vehicle records, while others use motor vehicle records to authenticate identities. The Commercial Driver's License Information System allows all DMVs nationwide to share motor vehicle records and maintain one complete driving record for an individual. Am. Assoc. of Motor Vehicle Admin., *Commercial Driver's License Information System (CDLIS).*[64] The National Highway Traffic Safety Administration administers the National Driver Register, a nationwide database aggregating state DMV information about "problem drivers," in part to help employers make hiring decisions. Nat'l Highway Traffic Safety Admin., *National Driver Register (NDR).*[65] Twenty-three jurisdictions connect motor vehicle records through the Digital Image Access and Exchange program. Am. Assoc. of Motor Vehicle Admin., *Digital Image Access and Exchange (DIA).*[66]

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http://www.dmv.state.va.us/webdoc/general/news/news.asp?id=6614.

[64] http://www.aamva.org/CDLIS/ (last accessed on Nov. 13, 2012).

[65] http://www.nhtsa.gov/Data/National+Driver+Register (last accessed on Nov. 13, 2012). The NDR contains information on license suspensions and revocations, DUI violations, and other serious traffic violations.

[66] http://www.aamva.org/Digital-Image-Access-and-Exchange/ (last accessed Nov. 13, 2012). Participants include: Alaska, Arizona, the District of Columbia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, North Dakota, Ohio,

Through the Help America Vote Verification (HAVV) program, forty-four jurisdictions verify voter registration information using motor vehicle records. Am. Assoc. of Motor Vehicle Admin., *Help America Vote Verification (HAVV)*.[67] The National Motor Vehicle Title Information System links together DMV motor vehicle records through a nationwide electronic database of vehicle information. See Nat'l Motor Vehicle Title Info. Sys., www.vehiclehistory.gov (last visited Nov. 14, 2012).

B. DHS REAL ID Regulations Compel State DMVs to Collect Far More Personal Information Than Before

The REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005), significantly expanded the scope of information contained in motor vehicle records. DMVs now collect many of the types of information described above in order to comply with DHS REAL ID regulations.

REAL ID sets standards for state driver's licenses intended to be used for federal purposes, such as passing through airport security checkpoints. REAL ID Driver's Licenses and Identification Cards, 6 C.F.R. § 37.1 (2008). In order to ensure that only legal U.S. persons have access to driver's licenses and identification cards, the regulations require applicants produce various documents related to citizenship, identity, and residency. *Id.* at § 37.11. "A

Pennsylvania, South Dakota, Tennessee, Virginia, Washington, West Virginia, and Wyoming.

[67] http://www.aamva.org/HAVV/ (last accessed on Nov. 13, 2012).

DMV may issue a REAL ID driver's license or identification card only to a person who has presented satisfactory evidence of lawful status." *Id.* at § 37.11(g) (referring to lawful immigration status or U.S. citizenship). As a consequence, DMVs now collect critical documents that establish identity, including birth certificates, passports, permanent resident cards, and IRS tax filings. *See* 6 C.F.R. § 37.11 (2008). State DMVs must verify application materials through central databases, *id.* at § 37.13, and retain copies of application materials for at least seven to ten years. *Id.* at § 37.31. Even if no license is issued, a state must retain digital photos of applicants for a minimum of five years. *Id.* at § 37.11(a)(1). When the DMV does issue a driver's license compliant with REAL ID, the card must meet specific requirements for security, *id.* at § 37.15, and contain certain categories of information. *Id.* at § 37.17.

Congress enacted the DPPA prior to the enactment of REAL ID. Yet even before the REAL ID requirements existed,[68] motor vehicle records contained sensitive personal data. Once state DMVs become fully compliant with the REAL ID

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[68] As EPIC previously discussed in its comprehensive REAL ID report, the requirements set by DHS insufficiently protect cardholder data. "[A]s part of the cost-saving effort, Homeland Security decided not to encrypt the data that will be stored on the card." EPIC, *REAL ID Implementation Review: Few Benefits, Staggering Costs* 3-4 (May 2008), available at https://epic.org/privacy/id_cards/epic_realid_0508.pdf.

requirements,[69] they will acquire, retain, and disclose an even broader spectrum of information.

C. Motor Vehicle Records Contain SSNs, Which Are Widely Used for Both Identification and Authentication

Private and public organizations frequently use SSNs to administer programs, verify eligibility for services, and conduct efficacy research. Cynthia M. Fagnoni, U.S. Gov't Accountability Office, GAO-06-586T, *Social Security Numbers: More Could Be Done to Protect SSNs* 1 (2006).[70] All state DMVs are required to collect SSNs under the REAL ID regulations. 6 C.F.R. § 37.11(e). These unique identifiers are also used by other state and local agencies, courts, healthcare organizations, credit rating agencies, banks, telecommunications companies, accountants, third-party contractors, and data brokers, among others. *Id.* at 4. The Government Accountability Office ("GAO") found that SSNs are "widely exposed to view in a variety of public records." *Id.* at 14. Because SSNs are used for many purposes, they are valuable to those who wish to acquire credit, commit crimes, or masquerade as another person.

What makes SSNs especially sensitive is that organizations use them as both an identifier and an authenticator. This means that in some contexts, the SSN will be used to verify identity (such as with

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[69] REAL ID full compliance is not required until Jan. 15, 2013. 6 C.F.R. § 37.51 (2011).

[70] *Available at* http://www.gao.gov/new.items/d06586t.pdf.

driver's license applications), while in other contexts the SSN will be used as a password (as is often the case in the financial services sector).[71] This dual-use of SSNs creates insecurity, similar to a situation where an individual's username and password are identical. The GAO reported that "[g]iven the significance of the SSN in committing fraud or stealing a person's identity, it is imperative that steps be taken to protect it. Without proper safeguards in place, SSNs will remain vulnerable to misuse, thus adding to the growing number of identity theft victims." Fagnoni at 17.

D. Motor Vehicle Records Now Contain Biometric Data, Which Are Both Unique and Immutable

Motor vehicle records also contain a plethora of biometric data. Biometric data include immutable physical characteristics that can substantially or uniquely identify an individual. New techniques attempt to automate the process of identification by comparing certain human features with records stored in digital databases, such as state DMV records.[72] Facial recognition, for example, extracts a human face from a scene, measuring points on the face (such as the distance between the eyes, or the shape of cheekbones), and then comparing the

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[71] *See generally*, EPIC, *Social Security Numbers*, *available at* https://epic.org/privacy/ssn/ (last accessed Nov. 9, 2012).

[72] *See generally*, EPIC, *Biometric Identifiers*, https://epic.org/privacy/biometrics/ (last accesed Nov. 9, 2012).

measurements to a database of digital pictures.[73] DMV driver's license photos often supply those databases. *See* Anil K. Jain and Brendan Klare, *Matching Forensic Sketches and Mug Shots to Apprehend Criminals*, 44 IEEE Computer, no. 5, May 2011, at 84-86.[74]

The types of biometric data held in motor vehicle records include fingerprints, facial photos, and iris data. Nine jurisdictions use fingerprints in their motor vehicle records, while thirty-eight jurisdictions use some form of facial recognition technology. Am. Assoc. of Motor Vehicle Admin., *Biometrics in AAMVA Community 2012*.[75] REAL ID mandates that irises (another unique identifier similar to fingerprints) be clearly visible in DMV digital photos. 6 C.F.R. § 37.17(e)(iii)-(iv) (2008).

Because biometric data are immutable characteristics, their use creates additional risks to personal privacy. The National Research Council reports, "[t]he key social issue surrounding biometrics is the seemingly irrevocable link between biometric traits and a persistent information record about a person. Unlike most other forms of recognition, biometric techniques are firmly tied to our physical bodies." Nat'l Research Council, *Biometric Recognition: Challenges and Opportunities*,

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[73] *See generally* EPIC, *Face Recognition*, https://epic.org/privacy/facerecognition/.

[74] *Available at* http://www.cse.msu.edu/~klarebre/docs/IEEE_Comp_Sketch.pdf.

[75] *Available at* http://www.aamva.org/ID-Security-Technologies/.

85 (Joseph N. Pato and Lynette I. Millett eds., The National Academies Press 2010).

The biometric records held by state DMVs create a bridge between one's publicly available biometric data and non-publicly available personal information.[76] Individuals typically cannot control the release of their biometric information. Biometrics can be collected without a person's consent, or even knowledge. One's picture can be taken on any public street. One's fingerprint can be lifted from any commonplace surface. With commercially available high-resolution cameras, even the details of one's irises can be easily photographed.[77] Given the increased risks to privacy of public disclosure of immutable physical characteristics maintained by state agencies, the Court should consider carefully the consequences of broadly interpreting an exception in a privacy statute that would otherwise safeguard this information.

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[76] For example, in California, fingerprints are protected "personal information," yet fingerprinting is not a per se infringement of one's right to privacy. *See Perkey v. Dep't of Motor Vehicles*, 42 Cal.3d 185 (Cal. 1986).

[77] For a discussion of the cultural, social, and legal risks associated with biometric data, *see generally* Nat'l Research Council, *Biometric Recognition: Challenges and Opportunities*, 85-115 (Joseph N. Pato and Lynette I. Millett eds., The National Academies Press 2010).

II. Identity Theft and Security Breaches Threaten the Privacy of Motor Vehicle Records

According to the Federal Trade Commission, identity theft is the number one concern of American consumers. Press Release, Fed. Trade Comm'n, *FTC Releases Top Complaint Categories for 2011: Identity Theft Once Again Tops the List* (Feb. 28, 2012).[78] Identity thieves cause substantial financial injury to Americans by exploiting motor vehicle records. An important first step in preventing identity theft is securing the enrollment documents, such as records of birth, that provide the basis for authentication. The DPPA is the primary legal mechanism that protects these records.

Motor vehicle records are also at risk when they are transferred from DMVs to third party databases, such as those maintained by major data brokers. The Congressional Bipartisan Privacy Caucus recently opened an investigation into data broker industry practices in an attempt to increase transparency and protect personal information. *See* Natasha Singer, *Congress to Examine Data Sellers*, N.Y. Times, Jul. 24, 2012, at B1. The disclosure of motor vehicle records to data brokers has resulted in identity thieves accessing "personal information from more than 145,000 consumers" in 2005. *See ChoicePoint Settles Data Security Case*, Reuters, June 1, 2007.

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[78] http://ftc.gov/opa/2012/02/2011complaints.shtm.

A. Identity Thieves Target Motor Vehicle Records to Obtain Personal Information

State DMVs recognize that identity theft is a significant problem. The California Department of Motor Vehicles notes that "[i]dentity theft and identity fraud are two of the fastest growing crimes in the United States." Cal. Dep't of Motor Vehicles, *Identity Fraud* (Apr. 2010).[79] As a result, state DMVs recognize that access to "confidential information such as your Social Security number" must be "highly restricted." Or. Dep't of Transp., *Identity Theft*.[80] Some state DMVs have even added specific provisions to protect SSNs. *See, e.g.*, Pa. Dep't of Transp., *Social Security Number Fact Sheet* (Oct. 2008);[81] N.Y. Dep't of Motor Vehicles, *Driver's Privacy Protection Act Frequently Asked Questions*.[82] States recognize that a "strong collaborative effort" is necessary to mitigate "the risk for fraud and identity theft." Pa. Dep't of Transp., *Reporting Fraud*.[83]

States stress the importance of the security of driver records. California has implemented advanced security measures to protect personal information. *See* Cal. Dep't of Motor Vehicles, *DMV and Your*

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[79] http://www.dmv.ca.gov/pubs/brochures/fast_facts/ffdl25.htm (last accessed Nov. 13, 2012).

[80] http://www.oregon.gov/odot/dmv/pages/driverid/idtheft.aspx (last accessed Nov. 13, 2012).

[81] *Available at* .http://www.dmv.state.pa.us/pdotforms/misc/ssfs.pdf.

[82] http://www.dmv.ny.gov/qaprive.htm (last accessed Nov. 13, 2012).

[83] http://www.dmv.state.pa.us/identity_theft/reporting/fraud.shtml (last accessed Nov. 13, 2012).

Information (2011).[84] This includes explicit limitations on employee access, disclosure, and alteration of personal information, as well as requiring that employees take "reasonable precautions" to prevent unauthorized use. *Id.* Wisconsin requires all employees to sign a contract promising to protect the privacy of the personal information contained in DMV records. *See* Wis. Dep't of Transp., *Recipient Employee Memorandum of Understanding Data Access to WisDot DMV Records* (Oct. 2009).[85]

The personal information of consumers is "the currency of identity theft." President's Identity Theft Task Force, *Combating Identity Theft: A Strategic Plan* 13 (Apr. 2007). State DMVs and third parties who obtain driver information are at risk because they hold the keys to fraud and identity theft. "SSNs, along with names and birth certificates, are among the three personal identifiers most often sought by identity thieves." U.S. Gov't Accountability Office, GAO-09-759T, *Governments Have Acted to Protect Personally Identifiable Information, but Vulnerabilities Remain* 8 (2009).[86]

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[84] http://www.dmv.ca.gov/dl/authority.htm (last accessed Nov. 13, 2012).

[85] http://www.dot.wisconsin.gov/drivers/forms/pars-mou.pdf (last accessed Nov. 13, 2012).

[86] *Available at* http://gao.gov/assets/130/122769.pdf. Social Security Numbers (SSNs), personal information, and credit card data are the "crown jewel[s] for a cyberattacker." Robbie Brown, *Hacking of Tax Records Has Put States on Guard*, N.Y. Times, Nov. 5, 2012, at A17.

State DMV records have been targeted numerous times over the past decade, which has increased the risk of driver identity theft. In one case, a criminal in Oregon obtained possession of a significant portion of the DMV database and used the information to commit identity theft. Natalie Brand, *Police Say Convicted Felon Charged with 50 Counts of ID Theft*, Fox Oregon (Mar. 24, 2012). Recently in Massachusetts "[t]wo masked men stole several bags containing various records that included registration transactions, duplicate titles, crash reports, citation payments" and other state DMV records. Mark E. Vogler, *RMV Document Theft Prompts Identity Fraud Concerns*, Gloucester Times, Apr. 6, 2012. A similar theft of computers containing sensitive driver information occurred at a Connecticut DMV. Gregory B. Hladky, *3 Computers Stolen from DMV Held Personal Info*, New Haven Register, Dec. 21, 2007. The Colorado state DMV put more than three million drivers at risk by sending "large batches of personal information over the Internet without encryption" and failing to "properly limit access to its database." Jessica Fender, *DMV Puts Coloradans at Risk of ID Theft*, Denver Post, Jul. 9, 2008.[87] Even these unintentional acts can put personal information at risk.

States are pushing back against DHS REAL ID regulations in part out of concern that new linked databases "of all licensing information" will create a clear "target of identity theft." Eric Lipton, *Rebellion Growing as States Challenge a Federal Law to Standardize Driver's Licenses*, N.Y. Times, Feb. 5,

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[87] *Available at* http://www.denverpost.com/news/ci_9822063.

2007.[88] This concern has proved valid, as cyber-attacks have recently targeted major centralized databases of personal information. Hackers recently attacked a South Carolina tax information system and stole 3.6 million SSNs and 387,000 credit and debit card numbers. Robbie Brown, *Hacking of Tax Records Has Put States on Guard*, N.Y. Times, Nov. 5, 2012, at A17. This attack and others highlight the risks state, federal, and private record systems that contain SSNs and other identifying data. These attacks also underscore the importance of federal privacy laws that seek to protect this information.

B. Data Brokers Put Motor Vehicle Records at Risk by Combining Them with Consumer Profiles

The personal information contained in motor vehicle records, which state law requires consumers to provide, is increasingly at risk not only in DMV databases but also in the systems of large data brokers. Data brokers are modern "data refineries" that collect and mine personal information stored in government and private sector records. *See* Natasha Singer, *You for Sale: Mapping, and Sharing, the Consumer Genome*, N.Y. Times, June 16, 2012, at B1. These data brokers rely on state DMV and other government records to build comprehensive consumer

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[88] *Available at* http://www.nytimes.com/2007/02/05/washington/05real.html. As a comprehensive law enforcement report recently noted, "[a]ll identity-related crime must begin, at some time, with the acquisition of valuable personal information by criminals." Dep't of Justice, *Identity-Related Crime: A Threat Assessment* 10 (November 2010).

profiles. *See, e.g.*, Letter from Axicom to Rep. Ed Markey, U.S. House of Representatives (Aug. 15, 2012);[89] Letter from Intelius to Reps. Edward J. Markey, Joe Barton, et al., U.S. House of Representatives (Aug. 22, 2012);[90] Michael Hiltzik, *Big Data Broker Eyes DMV Records*, L.A. Times, Dec. 1, 2005.

Identity thieves are eager to access the driver records contained in data broker systems, and they have succeeded in the past. In 2005, ChoicePoint "divulged the personal records of at least 162,000 individuals to a gang of Los Angeles identity thieves." Michael Hiltzik, *Big Data Broker Eyes DMV Records*, L.A. Times, Dec. 1, 2005. ChoicePoint eventually paid $500,000 to settle the claims of forty-four state attorneys general as a result of its failure to protect the sensitive consumer data. *ChoicePoint Settles Data Security Case*, Reuters, June 1, 2007. After the 2005 incident, ChoicePoint sought to obtain thirty

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[89] *Available at* http://markey.house.gov/sites/markey.house.gov/files/documents/Acxiom.pdf. As Axicom states in its letter:

> [S]tate and federal government records such as real property and assessor records, *motor vehicle records*, *driver's license records*, professional licenses, other government issued licenses such as hunting and fishing licenses, voter records, and court records, including bankruptcies, liens, judgments, and criminal conviction records.

Id. at 10 (emphasis added).

[90] *Available at* http://markey.house.gov/sites/markey.house.gov/files/documents/Intelius.pdf.

million additional motor vehicle records from the California DMV. Michael Hiltzik, *Big Data Broker Eyes DMV Records*, L.A. Times, Dec. 1, 2005.

Recently the Congressional Bipartisan Privacy Caucus opened an investigation into data broker industry practices. Natasha Singer, *Congress to Examine Data Sellers*, N.Y. Times, July 24, 2012, at B1. This investigation is the result of a rising concern that "an unprecedented amount of personal, medical and financial information about people" is collected and used "to the potential detriment of consumers." Natasha Singer, *Senator Opens Investigation of Data Brokers*, N.Y. Times, Oct. 10, 2012, at B3. Yet the data brokers' responses to the investigation "offer only a glimpse of the practices an industry that has operated in the shadows for years." Press Release, Congressional Bi-Partisan Privacy Caucus, *Nine Major Data Brokers Provide Lawmakers with Only a Partial Glimpse of Industry Controlling Information on Hundreds of Millions of Americans* (Nov. 8, 2012).[91]

This lack of transparency by an industry that compiles and uses records obtained from state DMVs highlights the need for strong legal protections to limit misuse of driver information. Absent such protections, drivers currently have no way to limit the disclosure of records they are required by law to provide, which can lead to identity theft and abuse of their personal information.

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[91] *Available at* http://markey.house.gov/press-release/lawmakers-release-information-about-how-data-brokers-handle-consumers'-personal.

III. In Order to Satisfy Congressional Intent and Safeguard Privacy, "Personal Information" Should Be Interpreted Broadly and DPPA Statutory Exceptions Should Be Interpreted Narrowly

This Court has recognized that large databases of personal information, maintained by state agencies, pose a significant threat to personal privacy. *See Whalen v. Roe*, 429 U.S. 589, 605-06 (1977) (noting "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files"). *See also*, *NASA v. Nelson*, 131 S. Ct. 746, 751 (2011) ("[w]e assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*."). At the time Congress enacted the DPPA, the Act gave "people more control over the disclosure of their personal information." 139 Cong. Rec. S15,763 (daily ed. Nov. 15, 1993) (statement of Sen. Barbara Boxer, a sponsor of the Act). The DPPA directly incorporated "both the intent of the 1974 Privacy Act" as well as "the recommendations of the landmark 1977 Privacy Protection Study Commission report." 139 Cong. Rec. S15,764 (daily ed. Nov. 16, 1993) (statement of Sen. John Warner, a sponsor of the Act).

A. Based on the Text and Congressional Intent, The Definition of "Personal Information" Is Broad and Encompassing.

The DPPA defines "personal information" to. mean "information that identifies an individual,

including" numerous enumerated examples. 18 U.S.C. §2725(3).[92] This language implies that other, non-enumerated categories of information, such as biometric data or unique IP addresses, also fall within the definition if they could identify an individual. *See Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle").[93]

The statute's closed list definition of "highly restricted personal information" further illustrates the scope of the "personal information" definition. 18 U.S.C. § 2725(4).[94] "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc.*, 484

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[92] The full text of the definition states:

> "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.

[93] "[T]he word *include* does not ordinarily introduce an exhaustive list." Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 132 (2012) (emphasis in original).

[94] The full text of the definition states: "highly restricted personal information' means an individual's photograph or image, social security number, [and] medical or disability information."

U.S. 365, 371 (1988). Contrasting the "highly restricted personal information" closed list definition with the open list definition of "personal information" shows that the latter is more encompassing than merely its enumerated examples.

The expansive scope of "personal information" aligns with Congress' intent to safeguard driver's control over their own information. *See Reno v. Condon*, 528 U.S. 141, 143 (2000) (stating that Congress passed the DPPA after finding that many States sell individuals' personal information).

> Easy access to personal information makes every driver in this Nation vulnerable and infringes on their right to privacy. Government's duty is to keep citizens safe and it should not, therefore, be contributing to insecurity.

139 Cong. Rec. S15,765 (daily ed. Nov. 16, 1993) (statement of Sen. Charles Robb).[95] Almost twenty years after the enactment of the DPPA, the information DMVs possess has grown increasingly more sensitive. In order for Americans to maintain privacy and control over their own information, the definition of "personal information" must include new types of data that can identify an individual.

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[95] "There is a war in this country to fight for privacy. People are now fighting, and this [Act] is coming to their assistance to provide the privacy, which I and many others thought existed." 139 Cong. Rec. S15,764 (daily ed. Nov. 16, 1993) (statement of Sen. John Warner, a sponsor of the bill).

B. The Scope of the Litigation Exception is Narrow and Does Not Permit Solicitation.

Limiting access to the sensitive information contained in motor vehicle records is the purpose of the DPPA. The D.C. Court of Appeals properly interpreted the (b)(4) litigation exception narrowly and protected the privacy of personal information in *Wemhoff v. D.C.*, 887 A.2d 1004 (D.C. Ct. App. 2005).[96] In that case, the court held that "acquiring personal information from the motor vehicle records for the purpose of finding and soliciting clients for a lawsuit is not a 'permissible use' within the meaning of § 2721(b)." *Id.* at 1012. That reading follows this Court's previous interpretation of the DPPA that States must "obtain a driver's affirmative consent to disclose the driver's personal information for use in surveys, marketing, solicitations, and other restricted purposes." *Reno v. Condon*, 528 U.S. 141, 145 (2000).

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[96] *See* 18 U.S.C. § 2721(b)(4). The full text of that provision states:

> For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to reverse the decision of the Court of Appeals for the Fourth Circuit below.

Respectfully submitted,

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